

# **Consumer Advocacy Before the Air Carrier Commission**

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## **FOREWORD**

We extend our sincere appreciation to all who contributed and without whose cooperation this study would not have been possible. In particular, the Bureau would like to thank Charles W. Totto, Executive Director of the Division of Consumer Advocacy of the Department of Commerce and Consumer Affairs, for his input and insight. Appreciation is also extended to the staff of the office of Senator Daniel Inouye.

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## Chapter 1

### INTRODUCTION

Due to its unique island geography, Hawaii has no major highway system connecting various points throughout the State. Therefore, unlike other states, both residents and visitors alike depend almost exclusively upon intrastate, or interisland, air transportation to meet their mobility needs. Accordingly, it is essential to maintain an efficient and stable interisland air transportation system.

The Legislature has determined that the best means of ensuring adequate interisland passenger and cargo air services to the various island communities at reasonable rates and fares is through the establishment of a comprehensive process to regulate interisland air transportation. To this end, the Legislature enacted House Bill No. 173, H.D. 3, S.D. 1, C.D. 1, during the regular session of 1993. This bill became law on June 28, 1993, as Act 332, Session Laws of Hawaii 1993. See Appendix A. The purpose of Act 332, as stated in section 1, is two-fold:

- (1) To establish a statutory scheme for the regulation of interisland air carriers (to the extent constitutionally permissible); and
- (2) To assist interisland carriers whose operations and revenues have been adversely affected by the declining number of visitors through guaranteed loans.

In creating a regulatory scheme for interisland air carriers, Act 332 establishes an air carrier commission having general supervision over all Hawaii air carriers providing air transportation and any related company.<sup>1</sup> Under this regulatory scheme, no person may engage in intrastate air transportation without first having been granted a certificate of public convenience and necessity by the commission.<sup>2</sup> The general powers of the commission include regulating air carriers through its investigative powers and establishing reasonable classifications of air carriers and adopting rules to regulate those classes. The commission's investigative powers are to include:

- (1) The manner in which carriers are operated with reference to public accommodation;
- (2) The fares and rates charged by carriers;
- (3) The value of the physical property of the carriers;
- (4) The issuance of stocks and bonds and the disposition of proceeds thereof;
- (5) The amount and disposition of the income and all financial transactions of carriers;

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- (6) The business relations of carriers with other persons, companies, or corporations;
- (7) The compliance of carriers with all applicable state and federal laws and with the provisions of their franchise, charter, and articles of association, if any;
- (8) The classifications, rules, regulations, practices, and service of carriers; and
- (9) All matters of every nature affecting the relations and transactions between carriers and the public, persons, or corporations.<sup>3</sup>

### **Objective of the Study**

Act 332 also directed the Legislative Reference Bureau to "conduct a study to assess the need for a consumer advocate to represent, protect, and advance the interests of all consumers before the air carrier commission."<sup>4</sup> The Act specified that the study include the following:

- (1) Recommendations on the general powers and duties of the consumer advocate;
- (2) An assessment of staffing and funding requirements;
- (3) An assessment of whether this responsibility may be incorporated under the purview of the present consumer advocate or, if a separate consumer advocate is recommended, where this position may be placed for administrative purposes; and
- (4) Proposed legislation necessary to implement the recommendations.<sup>5</sup>

### **Organization of the Report**

The report consists of the following:

Chapter 1 presents introductory material.

Chapter 2 provides a brief background of federal and state regulation of air carriers.

Chapter 3 discusses the issue relating to a Consumer Advocate for consumers of intrastate air carriers.

Chapter 4 contains recommendations, including necessary implementing legislation, and is followed by footnotes and various appendices.

**Endnotes**

1. Haw. Rev. Stat., §261C-6.
2. Id. at §261C-8.
3. Id. at §261C-7.
4. Section 3, Act 332, Session Laws of Hawaii, 1993.
5. Id.

## Chapter 2

### BACKGROUND

It is important to note that Act 332 does not provide for the immediate establishment of the Air Carrier Commission. Instead, the Act requires, as a prerequisite which triggers the effective date of Section 2 of Act 332 establishing the Air Carrier Commission, the enactment of federal legislation permitting the proposed air carrier regulatory scheme.<sup>1</sup> A brief history is necessary to understand the significance of this requirement.

Before 1978, the Federal Aviation Act of 1958,<sup>2</sup> gave the Civil Aeronautics Board (CAB) authority to regulate interstate air fares and to take administrative action against certain deceptive trade practices. However, it did not preclude state regulation and it contained a savings clause stating that the remedies provided in the Act were in addition to those existing at common law or by statute.<sup>3</sup> Consequently, states generally were able to regulate intrastate air fares and to enforce their own deceptive trade practice laws. Hawaii, however, being an island state, presented a unique situation.

#### Previous Hawaii Law

The Hawaii Legislature first attempted to regulate air carriers during the Regular Session of 1962 by prohibiting common carriers by air from engaging in air transportation without first obtaining a certificate of public convenience and necessity issued by the Hawaii Public Utilities Commission (PUC).<sup>4</sup> In prefatory language explaining the urgency of the measure deemed necessary in the public interest, the Legislature declared:

There is presently no comprehensive statute governing the transportation of persons or property for compensation or hire by air carriers, except by general provisions of the public utilities law which is wholly inadequate to cover this vital business affected with the public interest. It is essential that fair and impartial regulation of such air transportation be enacted for the public benefit and use and to promote safe, adequate, economical and effective service and foster sound economic service in such air transportation among the several carriers.

The Public Utilities Commission should be given such powers and imposed upon it (sic) such duties that would enable it to properly perform its functions relative to aeronautics. This is especially true when there is presently practically no legislation in this vital area and where there has (sic) already been two new applications for economical air service between the islands since statehood.<sup>5</sup>

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Because Hawaii already was embroiled in a controversy over control of the airspace between islands, however, the Legislature provided that the portion of the Act regulating air carriers would take effect "immediately upon the final determination by the courts that the [PUC] has jurisdiction to regulate air carriers operating between the eight major islands of the State . . . ."6

### The Battle for Control of the Skies

Next followed a series of court cases on the state and federal level involving an attempt by Island Airlines, Inc., to begin air carrier operations in Hawaii. Island applied for and obtained PUC approval of rates and capitalization for operation of a public utility common carrier by air. Hawaiian Airlines Inc. and Aloha Airlines, Inc., as intervenors, promptly appealed the PUC's approval to the Hawaii Supreme Court on the grounds that the PUC lacked jurisdiction because Island's proposed flights would be "between places in the same State through the airspace over any place outside thereof" within the meaning of the definition of "interstate air transportation" of the Federal Aviation Act of 1958.<sup>7</sup> Such a reading would mean that the CAB had jurisdiction over interisland air transportation and, consequently, that Island Airlines would have to obtain federal certification before it could begin operations, intrastate or interstate.

For procedural reasons not relevant here, the Hawaii Supreme Court issued an initial decision, followed by a supplemental opinion relating to the PUC's jurisdiction in the matter. The Hawaii Supreme Court held that: interisland air transportation is within the jurisdiction of the PUC; that CAB jurisdiction of air carriers of persons or property "in commerce" is not exclusive of PUC jurisdiction over intrastate traffic; and that an interisland air carrier does not require a federal certificate from the CAB merely because it is flying interisland because it is not flying "through the airspace over *any place* outside thereof" within the meaning of the second clause of the definition of "interstate air transportation" in the Federal Aviation Act of 1958.<sup>8</sup> In making its ruling, the Court relied upon the fact that the interisland flights, in flying over the high seas between places in Hawaii, would not be traversing the airspace of any other jurisdiction, foreign or domestic. The court flatly rejected the argument that the words "any place outside thereof" could refer to international waters outside the physical limits of a state or country. In the Court's words, such an interpretation would make the words "'any place' meaningless."<sup>9</sup>

However, in related cases, the federal courts have disagreed with the Hawaii Supreme Court's interpretation. At the same time the state cases were proceeding, the CAB sought and obtained a permanent injunction from the United States District Court of Hawaii against Island Airlines from continuing interisland flights authorized by the Hawaii PUC without first obtaining a federal certificate of convenience and necessity from the CAB.<sup>10</sup> On appeal from this injunction, the United States Court of Appeals for the Ninth Circuit remanded the proceedings to the United States District Court to determine whether the intervening open seas between the various Hawaiian Islands were within the territorial boundaries of Hawaii.<sup>11</sup>

On remand, the District Court found that: the boundaries of the State are comprised of the individual islands plus a three-mile belt around each; the channels between the islands are not within the boundaries of the State; the flights between the islands are in interstate air commerce through airspace over places outside the state; and the CAB has jurisdiction over such flights. Consequently, the court again granted the permanent injunction against Island Airlines.<sup>12</sup>

Island Airlines again appealed from the injunction and the Ninth Circuit Court again affirmed the District Court's ruling.<sup>13</sup> In its decision, the Circuit Court relied upon the recent United States Supreme Court decision in United States v. State of California,<sup>14</sup> which involved a determination of the seaward boundaries of California, with particular emphasis on the channel islands off Southern California and the Farallones off Northern California. In view of this case, the Circuit Court concluded that: "we should affirm the decision of the district court. We think United States v. State of California, supra, supports our conclusion, if it does not require it."<sup>15</sup>

Island Airlines's main argument of concern here was summarized by the Circuit Court as follows:

The boundaries of a state are determined by Congress, not international law. Congress, by the Hawaiian Statehood Act, established the "channels" between the Hawaiian Islands as being within the boundaries of the State of Hawaii. And even if we assume the enjoined flights pass over international waters subject to no sovereignty, such waters are not "a place" within the statute defining "interstate air transportation." (49 U.S.C. §1301(21)(a).)<sup>16</sup>

In addressing each of these points, the Circuit Court ruled as follows:

- (1) The boundaries of a state are determined by Congress, which may follow and adopt international law; and where Congress has failed to delineate boundaries with certainty, the courts must define such limits and, in doing so, need not ignore international law nor the position of the State Department;<sup>17</sup>
- (2) Congress, by the Hawaii Admission Act, *did not* establish the *channels* between the islands as within the state boundaries; and based upon the evidence, the district court was amply justified in finding that the State of Hawaii, both in coming into the union with and in its annexation to the United States, had not considered or insisted that the *channels* between the various islands of Hawaii were "historic waters" acquired by prescription;<sup>18</sup>
- (3) The court disagreed with Island Airlines's argument that the high seas over which the interisland flights are made are not "a place" within the statute

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defining jurisdiction of the CAB over interstate air transportation, concluding that the cases cited in the District Court's opinion and the congressional history "show that the language 'the air space over any place' outside a state makes interstate commerce 'transportation between points in the same State over a foreign country or [over] the *high seas* as well as over another state.'"<sup>19</sup>

Island Airlines also had contended that the federal agencies and the courts should refrain from exercising jurisdiction over interisland flights, in view of the decision by the Hawaii Supreme Court upholding the PUC's jurisdiction. In response, the court stated:

Such position, in our view, begs the fundamental question. If the flights are intrastate, then of course, the federal courts should not permit the C.A.B. to require a certificate, but conversely, if the "channels" are high seas, then flight over them should and must be subject to the C.A.B.'s authority. This general principle of the supremacy of federal control over interstate and high seas flights must prevail, if the facts support it, over the paramount importance to the Hawaiian economy of inter-island air transportation.<sup>20</sup>

### The Effects of Deregulation

A dramatic change in the airline industry occurred in the late 1970s with the passage of the Airline Deregulation Act (ADA) of 1978,<sup>21</sup> at the urging of economists who argued that the airline business was not a public utility but, in principle, a competitive industry.<sup>22</sup> The ADA removed all CAB controls over pricing and entry into various airline routes and eventually terminated the agency altogether in an effort to allow competitive market forces to achieve efficiency, innovation, low prices, and quality services. To ensure that states would not interfere with the deregulation, the ADA contained a preemption clause prohibiting the states from enforcing any law "relating to rates, routes, or services of any air carrier" having federal operating authority.<sup>23</sup>

Interestingly, other language in the preemption clause codified the federal caselaw with respect to Hawaii's interisland air carriers:

Any aircraft operated between points in the same State (other than the State of Hawaii) which in the course of such operation crosses a boundary between two States, or between the United States and any other country, or between a State and the beginning of the territorial waters of the United States, shall not, by reason of crossing such boundary, be considered to be operating in interstate or overseas air transportation.<sup>24</sup>

It would seem clear, then, that the ADA put to rest any further argument that flights interisland in Hawaii are not interstate air transportation.

In view of this, the Hawaii Legislature, in 1981, amended the law relating to the PUC to eliminate all state regulation of airlines as public utilities.<sup>25</sup> Indeed, the Senate Committee on Public Utilities specifically acknowledged the need to conform Hawaii law with existing federal law:

Under present law and practice, regulation of local airlines by the Public Utilities Commission is very limited. Only major financial transactions are reviewed. The P.U.C. testified that federal courts have determined that the Civil Aeronautics Board, and not the state regulatory agency, has jurisdiction over airline regulation. In addition, the Federal Air Deregulation Act of 1978 precludes state regulation of airlines. This bill would bring state law into conformity with federal law.<sup>26</sup>

One further court case bears mentioning. In Morales v. Trans World Airlines, Inc., et al., the United States Supreme Court ruled that the ADA pre-empts states from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes.<sup>27</sup> This case arose when the National Association of Attorneys General adopted Air Travel Industry Enforcement Guidelines containing detailed standards governing the content and format of airline advertising, the awarding of premiums to regular customers (*i.e.*, frequent flyers), and the payment of compensation to passengers who voluntarily yield their seats on overbooked flights.<sup>28</sup> When it appeared the Attorney General of Texas was intent upon enforcing these guidelines, respondents filed suit in federal court: claiming that state regulation of fare advertisements is pre-empted by ADA; seeking a declaratory judgment that, *inter alia*, section 2.5 of the guidelines (relating to failure to disclose all surcharges on fares) is pre-empted; and requesting an injunction restraining Texas from taking any enforcement action that would regulate the respondents' rates, routes, or services, or their advertising and marketing of the same.<sup>29</sup>

As mentioned previously, the ADA expressly pre-empted the states from enacting or enforcing any law, rule, or regulation "relating to rates, routes, or services of any air carrier" having federal operating authority.<sup>30</sup> The ADA also retained the CAB's previous enforcement authority regarding deceptive trade practices, which was transferred to the United States Department of Transportation when the CAB was abolished in 1985. However, it did not repeal or alter the savings clause contained in the prior version of the Federal Aviation Act.<sup>31</sup> Thus, there was some dispute as to what actions were pre-empted.

In addressing the petitioner's contention that section 1305(a)(1) only preempts states from actually prescribing rates, routes, or services, the Supreme Court stated: "Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to 'regulate rates, routes, and services.'"<sup>32</sup> Emphasizing that the key phrase is

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"relating to," the Court noted that it repeatedly has recognized that the phrase expresses a broad pre-emptive purpose:

We have repeatedly recognized that in addressing the similarly worded pre-emption provision of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1144(a), which pre-empts all state laws "insofar as they . . . relate to any employee benefit plan." We have said, for example, that the "breadth of [that provision's] pre-emptive reach is apparent from [its] language,"; that it has "broad scope," and an "expansive sweep"; and that it is "broadly worded," "deliberately expansive," and "conspicuous for its breadth." True to our word, we have held that a state law "relates to" an employee benefit plan, and is pre-empted by ERISA, "if it has a connection with or reference to such a plan."<sup>33</sup> Therefore, the Court held that: "Since the relevant language of the ADA is identical, we think it appropriate to adopt the same standard here: State enforcement actions having a connection with or reference to airline "rates, routes, or services" are pre-empted under . . . §1305(a)(1)."<sup>34</sup>

Thus, under current federal statutory and case law, Hawaii may not regulate interisland air carriers in any fashion. The extent or scope of any regulation that may occur in the future will depend upon the specific language contained in federal law enacted to permit such regulation.

## Endnotes

1. See Section 11, Act 332, Session Laws of Hawaii, 1993.
2. 72 Stat. 731, as amended, 49 U.S.C.A. §1301 et seq. (1993).
3. 49 U.S.C.A §1506.
4. See Section 3, Act 25, Session Laws of Hawaii, 1962, which added a new section, §104-21.8, to chapter 104 (relating to public utilities), Revised Laws of Hawaii, 1955. Chapter 104 was later renumbered as chapter 269.
5. Section 1, Act 25, Session Laws of Hawaii, 1962.
6. Id. at Section 4.
7. 49 U.S.C.A., §1301(21)(a) (1993).
8. See *In the matter of the Application of Island Airlines, Inc.*, 47 Haw. 1, 5 (1963) and *In the Matter of the Application of Island Airlines, Inc.*, 47 Haw. 87, 89 (1963) (supplemental opinion) (emphasis added).
9. 47 Haw. at 111. But see Chief Justice Tsukiyama's dissenting opinion in which he states:

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With due deference, I am unable to follow the court's view that the word "place" as employed in the Federal Aviation Act of 1958 means "a specific area with definite physical limits." . . . As seen, the legislative history of both the Civil Aeronautics Act of 1938 and the Federal Aviation Act of 1958 evinces that the specific intent and purpose of the word "place" as used therein was to refer to all places, including the high seas, outside of any particular State. Id. at 140-41 (emphasis supplied).

10. Island Airlines, Inc. v. Civil Aeronautics Board (D. Hawaii August 8, 1963).
11. Island Airlines, Inc. v. Civil Aeronautics Board, 331 F.2d 207 (9th Cir. 1964).
12. 235 F. Supp. 990 (D. Hawaii 1964).
13. Island Airlines, Inc. v. Civil Aeronautics Board, 352 F.2d 735 (9th Cir. 1965).
14. 381 U.S. 139, 85 S.Ct. 1401 (1965).
15. 352 F.2d at 737.
16. Id. at 739.
17. Id.
18. Id. at 739, 742. See id. at 739-42 for a full discussion of the claims made with respect to the channels.
19. Id. at 742. (emphasis supplied) (citations omitted).
20. Id.
21. 49 U.S.C.A. §1301 et seq. (1993).
22. For a discussion of the history and effects of the ADA see e.g., M. Brenner, J. Leet, and E. Schott, Airline Deregulation (Westport: ENO Foundation for Transportation, Inc., 1985); E. Bailey, "Airline Deregulation: Confronting the Paradoxes," Regulation 18-25 (Summer 1992); A. Goetz and P. Dempsey, "Airline Deregulation Ten Years After: Something Foul in the Air," 54 Journal of Air Law and Commerce 927 (1989); M. Kahan, "Airline Agony," Across the Board 22-27 (May 1992); M. Kahan, "Confessions of an Airline Deregulator," The American Prospect 38-50 (Winter 1992); K. Labich, "Should Airlines be Deregulated?" Fortune 82 (June 19, 1989); S. Morrison and C. Winston, "Airline Deregulation and Public Policy," Science 707 (August 18, 1989); R. Poole, "Deregulation: Finishing the job; fourteen years after airline deregulation began, it has more critics than supporters," 44 National Review 25 (November 2, 1992).
23. 49 U.S.C.A. §1305(a)(1) (1993).
24. Id. at §1305(b)(2) (emphasis added).
25. See Act 167, Session Laws of Hawaii, 1981.
26. Senate Standing Committee Report 670, Relating to H.B. No. 368 (signed into law as Act 167), Senate Journal at 1201, Regular Session of 1981.
27. 60 U.S.L.W. 4444, 4446 (June 6, 1992).

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28. Id. at 4444.
29. Id. at 4445.
30. 49 U.S.C.A. §1305(a)(1) (1993).
31. See notes 2 & 3 supra and accompanying text.
32. 60 U.S.L.W. at 4446.
33. Id. (citations omitted).
34. Id.

### Chapter 3

## ISSUES CONCERNING THE APPOINTMENT OF A CONSUMER ADVOCATE

Act 332, Session Laws of Hawaii, 1993, directed the Bureau to address, and make recommendations concerning, four issues with respect to a Consumer Advocate to represent consumers before the Hawaii Air Carrier Commission. These are:

- (1) Whether there is a need for a Consumer Advocate to represent, protect, and advance the interests of all consumers before the Commission;
- (2) Where responsibility for this function should be placed;
- (3) What should be the general powers and duties of the Consumer Advocate; and
- (4) What are the necessary staffing and funding requirements.

This chapter will explore each of these issues.

#### **Do the Airlines Need a Consumer Watchdog?**

Judging from the evidence (nationally) of consumer complaints against airlines,<sup>1</sup> especially concerning deceptive promotions, cancellation policies, limits on frequent flier benefits, overbooking, flight delays, and compensation for lost or damaged luggage, it clearly appears that many consumers do not feel adequately protected by current United States Department of Transportation rules. Accordingly, having a Consumer Advocate invested with the authority to represent, protect, and advance the interests of all consumers before the state Air Carrier Commission would seem highly desirable.

At this juncture, one caveat should be noted, however. A recent ruling by the United States Supreme Court interprets the preemption on state regulation of any airline practice that may affect the rates, routes, or services of any air carrier to include deceptive airline fare advertisements.<sup>2</sup> Therefore, the exact scope of activities that the Air Carrier Commission may regulate, and, concomitantly, those issues with which the Consumer Advocate may be involved, will depend upon the language of any federal legislation exempting Hawaii from current law.

### **A Consumer Advocate for Consumers of the Airline Industry: Whither Goest Thou?**

The Director of Commerce and Consumer Affairs is designated the Consumer Advocate under part II of chapter 269, *Hawaii Revised Statutes*, and is charged with representing, protecting, and advancing the interests of all consumers, including small businesses, of utility and transportation services and representing those interests before the PUC.<sup>3</sup> It should be clarified that the Consumer Advocate only represents consumers as a class and is not authorized by statute to advocate on behalf of individual consumers in their complaints against utilities. For all practical purposes, the Director's consumer advocacy functions are carried out by the Division of Consumer Advocacy (DCA) and its Executive Director who is appointed by the Director of Commerce and Consumer Affairs.<sup>4</sup>

The Bureau is of the opinion that responsibility for representing, protecting, and advancing the interests of consumers of the air carrier industry before the Hawaii Air Carrier Commission should be incorporated within the present Consumer Advocate. The rationale for this position is fairly straightforward.

Prior to 1981, a "public utility" was defined to include any person owning or operating an aerial transportation enterprise as a common carrier.<sup>5</sup> Thus, historically at least, the Consumer Advocate, whether as part of the Division of Consumer Advocacy (DCA) or, its predecessor, the Public Utilities Division (PUD), has been vested statutorily with responsibility for representing consumers' interests with respect to air carriers.<sup>6</sup> Furthermore, the Consumer Advocate is already concerned with some transportation issues because the present definition of "public utility" includes the transportation of passengers or freight over land or sea.<sup>7</sup>

Additionally, the regulatory scheme for air carriers proposed under Act 332 is similar to that for public utilities. Indeed, Section 2 of the Act,<sup>8</sup> establishing the regulatory scheme, is patterned after chapters 269 (Public Utilities Commission) and 271 (Motor Carrier Law) of the *Hawaii Revised Statutes*. Like the PUC, the Air Carrier Commission would be responsible for functions such as licensing and certification, rate regulation, and economic and business regulation. To assist it in carrying out its responsibilities, the Commission, again like the PUC, is vested with rule-making and investigative powers.

Because of these similarities, the Consumer Advocate and staff would already be familiar with and knowledgeable about the regulatory scheme proposed by Act 332. The regulatory process is extremely specialized and complex, requiring familiarity with the administrative process as well as the ability to process and integrate information relating to a number of different disciplines. Accordingly, it would take a considerable amount of start-up time just for a new Consumer Advocate and staff to orient themselves to the regulatory process. Moreover, although regulation of the airline industry obviously will require special expertise not presently found among the DCA's staff, it would seem that at least some regulatory and transportation related issues raised by air carrier regulation would be similar to

those currently faced by the DCA. Also, given the present economic climate and efforts to downsize government, it would seem to make little sense in duplicating the Consumer Advocate's functions under another department.

Finally, creating a separate Consumer Advocate for consumers of the air carrier industry raises a further problem of where such responsibility should be vested. The most logical placement choice, subject matter wise, would seem to be the Department of Transportation. However, since that is where the Commission will be located for administrative purposes, such a choice could frustrate the independence necessary for the Consumer Advocate to discharge fully the responsibility of representing, protecting, and advancing the interests of all consumers before the Commission.

A similar problem existed prior to 1976, when both the PUC and the PUD (now known as the DCA), were placed within the Department of Regulatory Agencies (now the Department of Commerce and Consumer Affairs -- DCCA). The Director of Regulatory Agencies was charged with the general duty of protecting consumers, including representing consumers in proceedings before the PUC. The PUD was responsible for the dual functions of representing the Director as Consumer Advocate and of providing the PUC with administrative and support services. The Legislative Auditor, in a 1975 audit of the public utilities program, cited this organizational scheme, and the resulting confusion of roles, as a major problem detracting from the public utilities program. In response, the Legislature followed the Auditor's recommendation and separated the PUC from the PUD and the Department of Regulatory Agencies and assigned it for administrative purposes to the Department of Budget and Finance.<sup>9</sup>

#### **Are the Powers and Duties of the Consumer Advocate Sufficient?**

As noted previously, the proposed regulatory scheme under Act 332 is similar to existing utility regulatory law.<sup>10</sup> It would seem logical, therefore, that a Consumer Advocate for consumers of the air carrier industry could function with powers and duties such as those *vested in the present Consumer Advocate*. Those powers and duties are delineated in sections 269-51, 269-54, and 269-55, *Hawaii Revised Statutes*.

In an interview with Mr. Charles W. Tutto, Executive Director of the DCA, and in a follow-up written statement (See Appendix B), he indicates that the DCA's powers and duties work reasonably well for regulatory purposes, with two caveats. The first caveat is that the DCA currently has no subpoena power to enforce its requests for information from utility companies. Mr. Tutto notes that "[t]o some degree[, the lack of subpoena power] is a result of the nature of the discovery process historically used for utility and transportation regulation, which limits discovery to written questions and answers, outside of exceptional circumstances."<sup>11</sup> Nevertheless, not having subpoena power presents a major obstacle to

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the DCA's ability to carry out its statutory functions.<sup>12</sup> The DCA thus is in the position of having to either depend upon the cooperation of the utility company from whom it has requested information or file a request with the PUC and possibly face a drawn-out process if the company requests a hearing before the PUC.<sup>13</sup> The lack of authority to issue subpoenas also frustrates the DCA's ability to obtain information through an oral deposition.<sup>14</sup>

This lack of subpoena power is difficult to understand, given the nature of the responsibility with which the Legislature has charged the DCA and the fact that other consumer agencies are vested with subpoena powers (*i.e.*, the Office of Consumer Protection --OCP and the Regulated Industries Complaints Office--RICO through the Director of Commerce and Consumer Affairs). Particularly if the DCA is given the additional responsibilities of representing consumers' interest before the Air Carrier Commission, it would seem not only logical but desirable as well to take steps to expedite the DCA's investigative and discovery process.

Furthermore, in view of the fact that the OCP and RICO both have subpoena power, there appears to be no rational reason for denying it to the DCA other than because of opposition by the utility companies. Although the argument may be made that the Director of Commerce and Consumer Affairs or the Attorney General, who is directed by law to act as legal counsel for the Consumer Advocate,<sup>15</sup> could use the subpoena power on behalf of the DCA, such approach could be subject to lengthy court challenges. Granting the DCA subpoena power outright is preferable because it would obviate any such challenges, indicate clearly the Legislature's intent, and, from a drafting standpoint, be much neater.

Mr. Totto's second caveat relates to consumer complaints. The majority of consumer complaints relating to air carrier service presumably will involve flight delays, overbooking, cancellation policies, limits on frequent flier benefits, compensation for lost or damaged luggage, and deceptive promotions. Inclusion of such issues clearly appears contemplated by Act 332.<sup>16</sup> Because such complaints are, to some extent, subjective, effective regulation in this area may present more difficulty than economic regulation. However, as noted by the Legislative Auditor, in a 1989 management audit of the State's public utilities program, "consumer complaints can be an important management and marketing tool in almost any consumer-oriented industry. They provide a means by which the industry can gauge customer reaction to the industry's goods and services and can determine where fault and deficiencies are occurring which deserve corrective action."<sup>17</sup> Thus, monitoring of such complaints is important to assess service quality, resolve recurring problems, and detect the emergence of new problems.

Individual consumer complaints are handled exclusively by the PUC under the current utility regulatory system. According to Mr. Totto, the justification for this assignment of responsibility is that the PUC "is the most direct, efficient, and effective way for consumers to seek and obtain remedies for their grievances" and, accordingly, is more likely to obtain

appropriate actions from a utility in contrast to the Consumer Advocate.<sup>18</sup> Obviously, the same justification could apply to the Air Carrier Commission with respect to air carrier related complaints. The primary disadvantage of this arrangement, however, as acknowledged by Mr. Tutto, is that the Consumer Advocate, by being removed from the actual complaint process, may have an insufficient sense of the problems experienced by consumers. Presumably, to cure this problem, the Legislature charged the Consumer Advocate with monitoring complaints received by the PUC.<sup>19</sup>

However, the actual workings of this arrangement were found to be less than satisfactory during the Legislative Auditor's 1989 management audit. Because this audit included an in-depth review of the complaint handling process with respect to utilities, some of its findings and conclusions may be relevant to this discussion of consumer complaints relating to the air carrier industry.

The Legislative Auditor found that the PUC and the DCA share responsibilities with respect to complaint handling.<sup>20</sup> Specifically, the DCA is charged statutorily with providing "a central clearing house of information by collecting and compiling all consumer complaints and inquiries concerning public utilities and [monitoring] **the handling of consumer complaints by the [PUC].**"<sup>21</sup> Interestingly, as noted by the Auditor, this language "reflects the apparent legislative assumption that the PUC would continue to have responsibility for handling consumer complaints after the advocacy function was separated from the PUC just as it had this responsibility up to then."<sup>22</sup> However, although Chapter 269 of the *Hawaii Revised Statutes* does vest the PUC with power relating to the investigation and rectification of consumer complaints, the statute itself does not explicitly assign complaint handling responsibilities to the PUC.<sup>23</sup> It is only in the PUC rules that provision is made for a formal and an informal complaint process.<sup>24</sup>

Furthermore, the Auditor's assessment of this complaint handling process was severely hampered by the lack of information within the PUC. Specifically, the Auditor discovered that the PUC had "no agency-wide system for receiving and logging complaints or for compiling information on the disposition of complaints. Similarly, there [was] no requirement or system for the collection of information on complaints handled directly by the utilities themselves."<sup>25</sup> The Auditor observed that, as a result of the inadequacies of the complaint handling process, "regulators are unable to use the handling of complaints as a means of measuring quality of service or of detecting the emergence of new problems."<sup>26</sup>

The Legislative Auditor found that "very little attention has been given to complaint handling by either the PUC or the DCA despite (or perhaps because of) their shared responsibilities in this area."<sup>27</sup> The Auditor attributed much of this neglect to the confusion over responsibility for complaint handling and insufficient staffing that attended the organizational separation of the PUC from the PUD in 1976.<sup>28</sup>

The Auditor concluded that:

Hawaii still lacks a comprehensive and integrated approach to complaint handling where consumer rights are clear and widely known, where there is machinery for the consistent, equitable, and timely handling of complaints, and where complaints at all levels are being monitored and evaluated as a means of determining the quality of service and improving that quality.<sup>29</sup>

Given the history of the utilities complaint handling process and the findings and conclusions of the Legislative Auditor, the Legislature would be wise to avoid repeating the situation with respect to the handling of complaints relating to air carriers. At the very least, the Legislature should be very clear in the assignment of responsibility for complaint handling and should provide sufficient resources to meet that responsibility. For example, with respect to utility related complaints, the Auditor recommended that the entire responsibility for complaint handling be vested either in the PUC or the DCA or that there be a clearer delineation of how the PUC and the DCA each should function with respect to complaint handling.<sup>30</sup>

In the instant case, the Legislature could vest responsibility for complaint handling with either the Air Carrier Commission or the Consumer Advocate or could split the responsibility as in the current system, as long as the assignment of responsibility is made clear. Finally, as the Auditor's report makes clear, key to the success of the complaint handling process, regardless of where responsibility is lodged, is the sufficiency of the staff and resources provided to undertake the task.

### **Assessment of Staffing and Funding Requirements**

The current DCA technical and professional staff positions consist of one economist, two statisticians (of which one is vacant and unfunded), one rate analyst, three utility engineers (of which one is vacant), four financial analysts (of which one is vacant and unfunded), a utilities administrator, a transportation administrator, and an executive director. All positions except the executive director are civil service.<sup>31</sup> None of the DCA's current staff have any experience or expertise in the air carrier industry. As noted by Mr. Tutto, the DCA's present limited staff and budget are "totally exhausted by utility and transportation matters"; moreover, the constant shortage of qualified staff and resources presents a serious hindrance to the DCA in meeting its current workload.<sup>32</sup>

Furthermore, the DCA's workload has increased considerably since 1989, when there were no major rate cases and only twenty to thirty capital improvement projects pending for review. By contrast, in 1993, the DCA has had sixty to seventy capital improvement cases pending review, five major rate cases, integrated resource plans for each of the five energy utilities, as well as another ten motor carrier rate cases and five water rate cases. Clearly,

then, the DCA will be unable to assume consumer advocate responsibilities contemplated in Act 332 without additional staff and resources.

It also is clear that the DCA's new staff will need to possess specialized knowledge of the air carrier industry.<sup>33</sup> Such expertise will be critical to the DCA's ability to carry out any responsibilities it might be given with respect to air carrier regulation. As Mr. Totto points out, "the cost factors for plant (e.g., hangars, aircraft, machinery, etc.) and operations and maintenance (e.g., fuel costs, labor, materials) are unique to this industry. Little knowledge can be transferred effectively from say, telecommunications, to the airline industry."<sup>34</sup> This specialization would either have to be developed on the job, which has obvious drawbacks, or the DCA would have to recruit staff from the airline industry itself.

However, salaries have presented a major stumbling block to the DCA's ability to recruit industry personnel. The DCA has thus far been unable to fill several of its vacant staff positions because of its inability to compete with industry salaries. The DCA would face a similar problem with respect to recruiting from the airline industry. To enable the DCA to compete for qualified individuals by offering salaries comparable to those in the industry, the DCA would have to be allowed to hire staff exempt from civil service pay schedules. Mr. Totto asserts that "this step is critical because only in this way will we be able to attract personnel with industry expertise, whether its (sic) in telecommunications or the airlines industry. To date industry experts are not attracted to state employment because of the relatively low wages."<sup>35</sup> Last year, the DCA pursued legislation, which did not pass, that would have permitted the hiring of exempt employees.<sup>36</sup>

Finally, yet another potential impediment to obtaining experienced staff exists, making it even more important that sufficient funding be available to attract knowledgeable individuals. As Mr. Totto also points out, "knowledge of the industry may be difficult to obtain for the regulatory context." Because airlines rate regulation ceased about fifteen years ago, Mr. Totto expressed concern over whether there exists "a pool of potential consultants with real expertise in this area, much less potential employees in Hawaii."<sup>37</sup>

Given that the DCA is presently understaffed and the existing staff and budget are fully committed and used to handle the current workload, it is clear that the DCA will require additional staff and funds to undertake the duties and responsibilities of representing, protecting, and advancing the interests of all consumers before the Air Carrier Commission. Moreover, because of the specialization required of the staff, the funding should be set at a level that allows the DCA to compete with private industry in recruiting staff. Furthermore, the DCA should be allowed to hire some exempt employees when necessary to obtain staff with sufficient expertise. Mr. Totto suggests the following additional staff positions, "SR" levels, and funding necessary to handle adequately the additional responsibilities:

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Position	SR Rating	Salary Range
<u>Economist</u> --evaluate economic trends in industry and determine rate of return.	SR-26	\$ 38,100
<u>Airline Industry Specialist</u> --to coordinate staff analysis and provide knowledge of costs of running regulated carrier.	Exempt	60,000
<u>Two Rate Analysts</u> --to determine fairness of proposed rates, tariffs, and revenues collected by airlines.	SR-26 SR-24	38,100 35,200
<u>Two Engineers</u> --focus on safety and engineering issues (e.g. aircraft cost and capital projects)	SR-26 SR-24	38,100 35,200
<u>Two Financial Analysts</u> --to review expenses and revenue requirement of carriers.	SR-26 SR-24	38,100 35,200
<u>Two Clerk-Typists</u> --for support for above staff.	SR-08 SR-08	17,700 17,700
<u>Consumer Education Specialist</u> --to inform and educate the public of rights as consumers.	SR-26	38,100 <u>\$391,500</u>
<u>Two Investigators*</u> --to research and resolve claims by individuals against carriers, should these duties be allocated to the DCA.	SR-26 SR-22	38,100 <u>31,300</u>
TOTAL:		\$460,900*

\* Necessary only if DCA, as opposed to Air Carrier Commission, handles individual complaints.

\*\* Modifications from original as it appears in Appendix B were made by DCA during external review of this Chapter and are based upon further discussions of Mr. Tutto with DCA managers and a review of the detailed explanation of what may be expected of DCA.

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In addition to these staff positions and funds, Mr. Totto also estimates that a minimum of \$500,000 in consulting funds will be necessary, especially for the initial regulatory period. This amount would be in addition to amounts currently expended for consultants on utility matters. Mr. Totto asserts that:

It will be critical that Hawaii use the most experienced and skillful analysts and consultants in developing rules, practices, procedures and decisional law to protect the rights of consumers and to implement an appropriate regulatory scheme. I anticipate that consultants would be heavily relied upon until the staff is trained and obtains some level of expertise and experience.

Today in regulating utility and transportation providers, we use a combination of staff and consultants. This has led to a very successful mix -- staff provides long term consistency and experience, while consultants are exceptional at advocating in issues that are new to our state and its utilities.<sup>38</sup>

An additional staffing matter relating to the legal representation to the DCA merits attention. Regulatory law is a specialized area of legal representation requiring specific training, experience, and the "ability to understand, integrate, and present information and materials relating to a number of different disciplines -- law, economics, finance, accounting, engineering and other technologies (such as telecommunications and energy generation)."<sup>39</sup>

The Attorney General and the Attorney General's deputies are required by statute to act as legal counsel for the Consumer Advocate.<sup>40</sup> Presently, three deputy attorneys general are assigned to allocate one hundred percent of their time to DCA work. According to Mr. Totto:

This number has been and is insufficient as evidenced by our need to annually hire outside counsel (for telecommunications matters at the national level) since well before my time here (1988). I suspect that the AG's office would need to assign the equivalent of at least [two attorneys] and a paralegal solely dedicated to the air carrier industry. Alternatively, the [DCA] would need to be statutorily enabled and funded to hire its own staff attorneys or the [DCA] would need to be funded to hire special deputy attorneys general.<sup>41</sup>

Mr. Totto's concerns are well-founded judging from past experience. The Legislative Auditor's 1989 audit of the public utilities program included an examination of the legal representation of the DCA. The Auditor's findings and conclusions on this point are extremely relevant to the issue at hand and warrant examination. The Auditor found that, with respect to the actual legal staff, the relationship between the AG and the DCA was "unstable."<sup>42</sup>

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One factor contributing to this instability is the fact that legal staff are often assigned to the DCA only on a part time basis. As a result, the DCA has to compete for service with other demands on the time and attention of its attorneys. Of much greater concern, however, is the high rate of turnover in legal personnel representing the DCA. In the period between 1980 and 1988, there have been at least eight changes among the deputy attorneys general assigned to the DCA (or its predecessor, the PUD). During this time, only two of the deputies have served more than three years (including one currently assigned). The average has been less than two years.

Under these arrangements, it is extremely difficult to develop the expertise and experience necessary to represent consumer interests effectively in proceedings before the PUC. . . . With this turnover and with deputies often being assigned on a part time basis and really answerable to the Attorney General and not to the [Consumer Advocate], the DCA has frequently been put in a difficult position insofar as being able to set and pursue strategy and maximize the utilization of available resources.

. . . .

If the DCA is to be effective in carrying out its responsibilities, it must be assured of continuity, competence, and control in the handling of its legal representation before the PUC. At present, such assurance is shaky at best.<sup>43</sup>

The Auditor also expressed concern that the Consumer Advocate "faces formidable adversaries" in the counsel representing the State's regulated utilities and transportation companies.<sup>44</sup> Accordingly, the Auditor concluded that:

If the DCA is to be effective in representing consumer interests before the PUC, it must be able to match within a reasonable degree the capabilities of those on the opposing side. This means having legal counsel who not only are expert and experienced in the field of utility regulatory law but are also able to work effectively as part of a total team in developing and carrying out legal strategy in representing and protecting consumer interests.<sup>45</sup>

The Auditor also pointed out that the legal representation of the DCA differs from that of other offices within the DCCA. The Office of Consumer Protection (OCP) and the Regulated Industries Complaints Office (RICO) have their own legal staffs quite apart from the AG, and the Division of Financial Institutions has its own financial institutions law analyst. As the Auditor observed, "in the cases of the OCP and RICO, separate legal staffs are apparently

justified on the basis that legal work is an integral and continuing part of the normal operations of those two units. Much the same logic would apply to DCA."<sup>46</sup>

Finally, Mr. Totto raises one other issue that affects staffing and underscores the critical need for sufficient staff and resources:

I note that Act 332, Section -13(d), constrains the commission to investigate and decide rate issues within six months, or else the rate goes into effect. This time period is extremely short relative to similar limits for utility cases. Under Section 269-16(d) an interim order by the PUC must be entered within ten months of the filed, completed application. Moreover, rates are not assumed to be reasonable at the expiration of that period. The [Consumer Advocate] has difficulty meeting the PUC time constraints with its current staff. The six month period will be even more taxing on resources, if a thorough review is to be conducted.<sup>47</sup>

In view of the foregoing discussion, it is obvious that the DCA will need sufficient staffing and funding to meet any new responsibilities it may be given with respect to the Air Carrier Commission.

Mr. Totto makes a final point concerning the critical need for funding. Mr. Totto contends that a permanent funding source for the DCA is of "paramount importance" to ensure effective regulation of the air carrier industry.<sup>48</sup> This could be achieved by imposing a fee on intrastate air carriers set at a percentage of their gross income, similar to that set on public utilities.<sup>49</sup> Funds collected would be deposited into a special fund for the Consumer Advocate. Because the fee is passed on to the consumer, this in effect becomes a user fee. Mr. Totto submits that user funding is justified because consumers are the beneficiaries of proper consumer protection and rate regulation. Bills to create special funds for the PUC and the DCA were introduced during the 1993 Regular Session of the Legislature but failed to pass. (See House Bill No. 1888, H.D. 2, S.D. 2, and Senate Bill No. 1709, H.D. 2, in Appendix C.) Mr. Totto suggests that these bills could be used as a starting point for a bill to impose a fee on intrastate air carriers and to dedicate a portion of these fees and of the fees imposed on public utilities for the support of the DCA.<sup>50</sup>

## Endnotes

1. The literature is full of stories of consumer abuse in the airline industry and efforts to curb such abuses. See e.g., Air Travel: Effectiveness of State Consumer Protection Efforts Varies, United States General Accounting Office, August 1990; "New rights for air travelers?" 7 Consumer Reports Travel Letter 73-74 (July 1991); "A Try At Helping Frustrated Fliers," Chicago Tribune, September 10, 1987, at 26; "More and More, Deregulation Won't Fly," Los Angeles Times, July 28, 1987, at 5, col. 1.
2. See Chapter 2, notes 27-34 and accompanying text.

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3. Haw. Rev. Stat., §269-51. The Consumer Advocate also represents the consumer interest before the Federal Communications Commission and the Federal Maritime Commission. See Haw. Rev. Stat., §269-54(b)(7).
4. See Haw. Rev. Stat., §269-52.
5. Haw. Rev. Stat., §269-1 (1980 supp.). See also note 4 and accompanying text in Chapter 2.
6. See generally chapter 2 for a discussion of prior law and history with respect to state regulation of air carriers.
7. Haw. Rev. Stat., §269-1.
8. This section of Act 332 has been codified as chapter 261C of the Hawaii Revised Statutes.
9. As discussed in: Legislative Auditor, Management Audit of the Public Utilities Program of the State of Hawaii (Honolulu: 1989), at 4 & 16 [hereinafter cited as 1989 Audit].
10. See note 2 supra and accompanying text.
11. Letter from Charles W. Tutto, Executive Director of the Division of Consumer Advocacy, to Charlotte A. Carter-Yamauchi, November 4, 1993, at 3 [hereinafter cited as Tutto].
12. In particular, this hampers the DCA's ability to conduct investigations to secure information necessary to instituting proceedings for appropriate relief before the PUC. See Haw. Rev. Stat., §269-(b)(2) & (d).
13. See Haw. Rev. Stat., §269-54(d).
14. See Tutto, at 3.
15. Haw. Rev. Stat., §269-53.
16. See specifically Haw. Rev. Stat., §§261C-7 & 261C-12.
17. 1989 Audit, at 39.
18. Tutto, at 3.
19. See Haw. Rev. Stat., §269-53.
20. Id. at 41.
21. Haw. Rev. Stat., §269-55 (emphasis added).
22. 1989 Audit, at 41.
23. Id.
24. See id. at 41-42.
25. Id. at 44.
26. Id. at 47.
27. Id. at 42-43.

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28. See note 9 supra and accompanying text. According to the Auditor, this separation resulted in the three staff investigators previously responsible for complaint handling remaining with the PUD instead of being transferred with the PUC. Thus, the PUC had no direct resources with which to handle this function. Although the PUD was given its own responsibilities relating to complaints, the staff investigators were not used to define or implement these new responsibilities. The PUD did, however, agree to assist the PUC with complaint handling until the PUC was given the necessary personnel to carry out its complaint handling duties. The PUC did not receive its own investigators for this function until 1985 when two of the PUD's investigators were transferred to the PUC. Besides investigating complaints, these investigators were given the additional responsibility of carrying out the PUC's pipeline safety inspection program. The DCA's third investigator was transferred to RICO in 1987, and since that time, the DCA has had no staff assigned to work in the area of consumer complaints. The Auditor summarized the situation as follows:

No concerted individual or joint attention has been given to complaint handling by the PUC and the DCA in the past 12 years. Since the three investigators were transferred out of the DCA, that agency seems to have assumed that it no longer has any ongoing responsibilities in the area of complaint handling and has given the subject virtually no attention. As for the PUC, it has not seen any need to focus on this subject.

See 1989 Audit, at 43-44.

29. Id. at 43.
30. Id. at 48.
31. See Haw. Rev. Stat., §269-52.
32. Totto, at 2-3.
33. In particular, expertise would be required in the areas of financial analysis, economics, engineering, tourism, and fuel pricing and its effect on the industry. Mr. Totto notes in his letter, at 2, that the type of rate regulation to be used by the Air Carrier Commission is not specified. However, as Mr. Totto explained during an interview with Bureau staff, if rate base, rate of return regulation or some variation of it is used, expertise in these areas would be critical to determining a fair rate of return for each airline company. Under such regulation, the commission will have to set a fair rate of return that will allow each company to earn back all its expenses plus a set percentage of profit on capital investments. The rate is based upon the company's projection of budget and revenues. The financial analyst needs to be able to determine whether these projections are fair and reasonable. If the rate of return set is too high, it will allow the company to over earn which will be unfair to consumers; if it is set too low, the company will under earn and thus be too financially shaky to attract investors. Furthermore, in a regulated environment, there always is pressure to have the regulated company pay for any unregulated subsidiary. Consequently a lot of sliding of expenses back and forth occurs. Staff would have to be sufficiently knowledgeable to be able to mentally take the companies and their affiliated subsidiaries apart and see how they operate to determine appropriate expenses. Interview with Charles W. Totto, Executive Director, Division of Consumer Advocacy, August 2, 1993.
34. Totto, at 2.
35. Id. at 5.
36. Id. at 5; See also House Bill No. 1882 & Senate Bill No. 1704, Seventeenth Legislature, 1993, State of Hawaii.
37. Totto, at 3.
38. Id. at 5.

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39. 1989 Audit, at 17.
40. Haw. Rev. Stat., §269-53.
41. Tutto, at 5.
42. 1989 Audit, at 18.
43. Id. at 18-19.
44. Id. at 18. The Auditor observed that these companies "rely upon in-house legal staffs and outside law firms who specialize in utility regulatory law and who have developed considerable experience and expertise in this legal field. This is in addition to other staff with expertise in other areas, such as economics, finance, accounting and engineering." Id. at 17-18.
45. Id. at 18.
46. Id. at 19.
47. Tutto, at 5-6.
48. Id. at 6.
49. See Haw. Rev. Stat., §269-30.
50. Id. at 6.

## Chapter 4

### RECOMMENDATIONS

Chapter 3 examined the: need for and placement of a consumer advocate to represent, protect, and advance the interests of all consumers before the Hawaii Air Carrier Commission; general powers and duties necessary to perform the advocacy function; and staffing and funding requirements necessary to discharge the responsibility. This Chapter presents the Bureau's recommendations concerning the foregoing topics and proposed legislation necessary to implement the recommendations made. The reader is cautioned to read chapters 3 and 4 together for a full discussion of the issues addressed herein. The Bureau has based its examination of and recommendations concerning the consumer advocacy function on the scope of regulation contemplated by Act 332, Session Laws of Hawaii 1993. However, in view of the recent approval by the United States Senate Commerce, Science and Transportation Committee of an amendment to the bill reauthorizing the Federal Aviation Administration, a further cautionary remark is in order. (See Appendix D for the text of the amendment.) While the amendment would permit some state regulation of intrastate air carriers, such regulation would be limited to intrastate air transportation of passengers. Although this amendment is far from final approval,<sup>1</sup> such restriction to passengers would limit the consumer advocacy function envisioned in this report. Thus the reader should bear in mind that the exact nature and scope of the issues with which a consumer advocate may be involved will depend upon the specific language contained in any legislation passed by Congress that will permit Hawaii to regulate intrastate air carriers.

#### The Need for and Placement of Consumer Advocacy Functions

In view of the number of consumer abuses and complaints nationwide concerning the air carrier industry,<sup>2</sup> the Bureau believes that consumers of air carrier services would benefit from having an advocate to represent, protect, and advance their interests. Moreover, for the reasons discussed in Chapter 3, the Bureau recommends that this advocacy function be incorporated within the present Consumer Advocate.<sup>3</sup> Legislation permitting the Consumer Advocate to represent the public in intrastate air carrier matters will be necessary to effectuate this recommendation. At a minimum, this would entail amending sections 269-51 and 269-54, *Hawaii Revised Statutes*, as follows:

SECTION . Section 269-51, Hawaii Revised Statutes, is amended to read as follows:

"§269-51 Consumer advocate; director of commerce and consumer affairs. The director of commerce and consumer affairs shall be the consumer advocate in hearings before the public utilities commission[.] and the air carrier commission. The consumer advocate shall represent, protect, and advance the interests of all consumers, including small businesses, of utility services[.] and intrastate air carrier services. The consumer advocate shall

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not receive any salary in addition to the salary received as director of commerce and consumer affairs.

The responsibility for advocating the interests of the consumer of utility services and intrastate air carrier services shall be separate and distinct from the responsibilities of the public utilities commission and the air carrier commission and those assistants employed by [the] each commission. As consumer advocate, the director of commerce and consumer affairs shall have full rights to participate as a party in interest in all proceedings before the public utilities commission[.] and the air carrier commission."

SECTION . Section 269-54, Hawaii Revised Statutes, is amended to read as follows:

"§269-54 **General powers; duties.** (a) The consumer advocate shall have the authority expressly conferred by or reasonably implied from the provisions of this part[.] and of chapter 261C.

(b) The consumer advocate may:

- (1) Adopt rules pursuant to chapter 91 necessary to effectuate the purposes of this part[.] and of chapter 261C.
- (2) Conduct investigations to secure information useful in lawful administration of any provision of this part[.] and of chapter 261C.
- (3) Assist, advise, and cooperate with federal, state, and local agencies and officials to protect and promote the interests of the consumer in the fields of public utilities [field.] and intrastate air carrier transportation.
- (4) Study the operation of laws affecting all consumers, including small businesses, of utility services and intrastate air carrier services and recommend to the governor and the legislature new laws and amendments of laws in the consumers' interest in the fields of public utilities [field.] and intrastate air carrier transportation.
- (5) Organize and hold conferences on problems affecting consumers of utility services[.] and intrastate air carrier services.
- (6) Perform [such] other acts as may be incidental to the exercise of the functions, powers, and duties set forth in this section.
- (7) Represent the interests of consumers of utility services and intrastate air carrier services before any state or federal agency or instrumentality having jurisdiction over matters [which] that affect those interests.

(c) Whenever it appears to the consumer advocate that: (1) any public utility has violated or failed to comply with any provision of this part or of any state or federal law; (2) any public utility has failed to comply with any rule, regulation, or other requirement of the public utilities commission or of any other state or federal agency; (3) any public utility has failed to comply with any provision of its charter or franchise; (4) changes, additions, extensions, or repairs to the plant or service

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of any public utility are necessary to meet the reasonable convenience or necessity of the public; or (5) the rates, fares, classifications, charges, or rules of any public utility are unreasonable or unreasonably discriminatory, the consumer advocate may institute proceedings for appropriate relief before the public utilities commission. The consumer advocate may appeal any final decision and order in any proceeding to which the consumer advocate is a party in the manner provided by law.

(d) Whenever it appears to the consumer advocate that: (1) any intrastate air carrier has violated or failed to comply with any provision of this part or of chapter 261C or of any other state or federal law; (2) any intrastate air carrier has failed to comply with any rule, regulation, or other requirement of the air carrier commission or of any other state or federal agency; (3) any intrastate air carrier has failed to comply with any provision of its charter or franchise; (4) changes, additions, extensions, or repairs to the planes, equipment, or service of any intrastate air carrier are necessary to meet the reasonable convenience or necessity of the public; or (5) the rates, fares, classifications, charges, or rules of any intrastate air carrier are unreasonable or unreasonably discriminatory, the consumer advocate may institute proceedings for appropriate relief before the air carrier commission. The consumer advocate may appeal any final decision and order in any proceeding to which the consumer advocate is a party in the manner provided by law.

~~[(d)]~~ (e) The consumer advocate may file with the public utilities commission and serve on any public utility a request in writing to furnish any information reasonably relevant to any matter or proceeding before the commission or reasonably required by the consumer advocate to perform the duties hereunder. Any such request shall set forth with reasonable specificity the purpose for which the information is requested and shall designate with reasonable specificity the information desired. The public utility shall comply with such request within the time limit set forth by the consumer advocate unless within ten days following service it requests a hearing on the matter before the public utilities commission and states its reasons therefor. If a hearing is requested, the public utilities commission shall proceed to hold the hearing and make its determination on the request within thirty days after the same is filed. The consumer advocate or the public utility may appeal to the supreme court the decision of the commission on any such request. Subject to the foregoing, such requests may ask the public utility to: (1) furnish any information with which the consumer advocate may require concerning the condition, operations, practices, or services of the public utility; (2) produce and permit the consumer advocate or the consumer advocate's representative to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, recordings, and other data compilations from which information can be obtained), or to inspect and copy, test, or sample any designated tangible thing which is in the possession, custody, or control of the public utility; or (3) permit entry upon land or other property in the

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possession or control of the utility for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object thereon.

(f) The consumer advocate may file with the air carrier commission and serve on any intrastate air carrier a request in writing to furnish any information reasonably relevant to any matter or proceeding before the commission or reasonably required by the consumer advocate to perform the duties under this part. Any such request shall set forth with reasonable specificity the purpose for which the information is requested and shall designate with reasonable specificity the information desired. The air carrier shall comply with the request within the time limit set forth by the consumer advocate unless within ten days following service it requests a hearing on the matter before the air carrier commission and states its reasons therefor. If a hearing is requested, the air carrier commission shall proceed to hold the hearing and make its determination on the request within thirty days after the same is filed. The consumer advocate or the intrastate air carrier may appeal to the supreme court the decision of the commission on any such request. Subject to the foregoing, the requests may ask the intrastate air carrier to: (1) furnish any information with which the consumer advocate may require concerning the condition, operations, practices, or services of the intrastate air carrier; (2) produce and permit the consumer advocate or the consumer advocate's representative to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, recordings, and other data compilations from which information can be obtained), or to inspect and copy, test, or sample any designated tangible thing which is in the possession, custody, or control of the intrastate air carrier; or (3) permit entry upon land or other property in the possession or control of the intrastate air carrier for the purpose of inspecting, measuring, surveying, photographing, testing, or sampling the property or any designated object thereon."

### **Powers and Duties of the Consumer Advocate**

The Bureau finds that, with two exceptions, the existing powers and duties of the present Consumer Advocate are sufficient to encompass the scope of authority and responsibility indicated for a consumer advocacy function by Act 332.

#### **Subpoena Power**

The first exception concerns the issue of the Consumer Advocate's subpoena power. As discussed in Chapter 3, there is no specific statutory authority for the Consumer Advocate to issue subpoenas.<sup>4</sup> Instead, the *Hawaii Revised Statutes* contain a specific provision allowing the Consumer Advocate to file upon a utility a request for information.<sup>5</sup> The Bureau

believes that this is insufficient and that the Consumer Advocate's lack of authority to issue subpoenas impedes its present statutory responsibilities. This impediment will be magnified if the Legislature vests the Consumer Advocate with the additional responsibility of representing the interests of consumers of the air carrier industry. Although the argument may be made that the Director of Commerce and Consumer Affairs or the Attorney General could exercise the subpoena power on behalf of the Consumer Advocate,<sup>6</sup> the Bureau believes that an outright grant of authority to the Consumer Advocate to issue subpoenas is preferable.

Therefore, the Bureau recommends that subsection (d) of section 269-54, *Hawaii Revised Statutes*, be amended by deleting the existing language relating to requests for information and substituting language authorizing the Consumer Advocate to issue subpoenas. Accordingly, if the Legislature follows this recommendation, section 269-54, in its entirety, should be amended, not as set out above but, as follows:

SECTION . Section 269-54, Hawaii Revised Statutes, is amended to read as follows:

"§269-54 **General powers; duties.** (a) The consumer advocate shall have the authority expressly conferred by or reasonably implied from the provisions of this part[.] and of chapter 261C.

(b) The consumer advocate may:

- (1) Adopt rules pursuant to chapter 91 necessary to effectuate the purposes of this part[.] and of chapter 261C.
- (2) Conduct investigations to secure information useful in lawful administration of any provision of this part[.] and of chapter 261C.
- (3) Assist, advise, and cooperate with federal, state, and local agencies and officials to protect and promote the interests of the consumer in the fields of public utilities [field.] and intrastate air carrier transportation.
- (4) Study the operation of laws affecting all consumers, including small businesses, of utility services and intrastate air carrier services and recommend to the governor and the legislature new laws and amendments of laws in the consumers' interest in the fields of public utilities [field.] and intrastate air carrier transportation.
- (5) Organize and hold conferences on problems affecting consumers of utility services[.] and intrastate air carrier services.
- (6) Perform [such] other acts as may be incidental to the exercise of the functions, powers, and duties set forth in this section.
- (7) Represent the interests of consumers of utility services and intrastate air carrier services before any state or federal agency or instrumentality having jurisdiction over matters [which] that affect those interests.

(c) Whenever it appears to the consumer advocate that: (1) any public utility has violated or failed to comply with any provision of this part or of any state or federal law; (2) any

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public utility has failed to comply with any rule, regulation, or other requirement of the public utilities commission or of any other state or federal agency; (3) any public utility has failed to comply with any provision of its charter or franchise; (4) changes, additions, extensions, or repairs to the plant or service of any public utility are necessary to meet the reasonable convenience or necessity of the public; or (5) the rates, fares, classifications, charges, or rules of any public utility are unreasonable or unreasonably discriminatory, the consumer advocate may institute proceedings for appropriate relief before the public utilities commission. The consumer advocate may appeal any final decision and order in any proceeding to which the consumer advocate is a party in the manner provided by law.

[(d) The consumer advocate may file with the commission and serve on any public utility a request in writing to furnish any information reasonably relevant to any matter or proceeding before the commission or reasonably required by the consumer advocate to perform the duties hereunder. Any such request shall set forth with reasonable specificity the purpose for which the information is requested and shall designate with reasonable specificity the information desired. The public utility shall comply with such request within the time limit set forth by the consumer advocate unless within ten days following service it requests a hearing on the matter before the public utilities commission and states its reasons therefor. If a hearing is requested, the public utilities commission shall proceed to hold the hearing and make its determination on the request within thirty days after the same is filed. The consumer advocate or the public utility may appeal to the supreme court the decision of the commission on any such request. Subject to the foregoing, such requests may ask the public utility to: (1) furnish any information with which the consumer advocate may require concerning the condition, operations, practices, or services of the public utility; (2) produce and permit the consumer advocate or the consumer advocate's representative to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, recordings, and other data compilations from which information can be obtained), or to inspect and copy, test, or sample any designated tangible thing which is in the possession, custody, or control of the public utility; or (3) permit entry upon land or other property in the possession or control of the utility for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object thereon.]

(d) Whenever it appears to the consumer advocate that: (1) any intrastate air carrier has violated or failed to comply with any provision of this part or of chapter 261C or of any other state or federal law; (2) any intrastate air carrier has failed to comply with any rule, regulation, or other requirement of the air carrier commission or of any other state or federal agency; (3) any intrastate air carrier has failed to comply with any provision of its charter or franchise; (4) changes, additions, extensions, or repairs to the planes, equipment, or service of any intrastate

air carrier are necessary to meet the reasonable convenience or necessity of the public; or (5) the rates, fares, classifications, charges, or rules of any intrastate air carrier are unreasonable or unreasonably discriminatory, the consumer advocate may institute proceedings for appropriate relief before the air carrier commission. The consumer advocate may appeal any final decision and order in any proceeding to which the consumer advocate is a party in the manner provided by law.

(e) The consumer advocate, in the course of the consumer advocate's investigations, is empowered pursuant to and in accordance with the rules of court to subpoena witnesses, examine them under oath, and require the production of books, papers, documents, or objects which the consumer advocate deems relevant or material to the inquiry. Upon application by the consumer advocate, obedience to the subpoena may be enforced by the circuit court in the county where the person subpoenaed resides or is found in the same manner as a subpoena issued by the clerk of a circuit court."

### **Individual Consumer Complaints**

The second exception to the Consumer Advocate's present powers and duties relates to the handling of individual consumer complaints. As recognized in Chapter 3, consumer complaints provide an important means of assessing consumer satisfaction and service quality, resolving recurring problems, and identifying the emergence of new problems.<sup>7</sup> As discussed, there apparently is a justifiable rationale for the present assignment of responsibility to the PUC for handling individual consumer complaints and to the Consumer Advocate for monitoring these complaints.<sup>8</sup> However, in view of the Legislative Auditor's criticisms of the utility complaint handling process,<sup>9</sup> the Bureau believes the Legislature would be wise to avoid similar pitfalls with respect to the handling of individual complaints relating to air carriers. Accordingly, assuming that individual consumer complaint handling falls within the scope of regulation permitted by federal law, the Bureau recommends the Legislature be very clear in its designation of responsibility for complaint handling. Options include assigning the entire responsibility solely to either the Air Carrier Commission or the Consumer Advocate or, as with utility related complaints, assigning responsibility for actually handling complaints to the Commission and requiring the Consumer Advocate to monitor the process. Perhaps more importantly, however, the Legislature should allocate sufficient staff and resources along with the responsibility to ensure that the entity assigned the responsibility has the actual ability to discharge it in a satisfactory manner.

If the Legislature determines to mirror the present arrangement with respect to utility complaints, it should amend section 261C-6, *Hawaii Revised Statutes*, relating to the Air Carrier Commission's duties, to include specific responsibility for handling individual consumer complaints and amend section 269-55, relating to the Consumer Advocate, to include responsibility for monitoring the complaint handling process. These amendments would be as follows:

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SECTION . Section 261C-6, Hawaii Revised Statutes, is amended to read as follows:

"~~[[~~§261C-6~~]]~~ **General powers and duties.** The air carrier commission shall have general supervision over all Hawaii air carriers providing air transportation and, to the extent determined by the commission to be necessary to effectuate the purposes of this chapter, over any related company, and shall perform the duties and exercise the powers imposed or conferred upon it by this chapter. The general powers of the commission shall include, but not be limited to:

- (1) Regulating Hawaii air carriers by utilizing, in addition to its other powers, the investigative powers set forth in section 261C-7;
- (2) Establishing reasonable classifications of Hawaii air carriers based upon the nature of the services provided by the carriers, and adopting rules pursuant to chapter 91 to regulate those classes of Hawaii air carriers; [and]
- (3) Exempting from this chapter, in whole or in part, when determined to be in the public interest, any Hawaii air carrier engaging in air transportation solely with aircraft with a maximum seating capacity of not more than seventeen passengers or maximum cargo capacity of not more than three thousand pounds[.]; and
- (4) Adopting procedures and rules pursuant to chapter 91 to record, analyze, address, and resolve individual consumer complaints relating to intrastate air carriers."

SECTION . Section 269-55, Hawaii Revised Statutes, is amended to read as follows:

"~~[[~~§269-55~~]]~~ **Handling of complaints.** The consumer advocate shall provide a central clearing house of information by collecting and compiling all consumer complaints and inquiries concerning public utilities and intrastate air carriers and shall review complaint data and monitor the handling of consumer complaints by the public utilities commission[.] and the air carrier commission. The consumer advocate shall report annually to the legislature on the types and dispositions of utility and air carrier related complaints and shall take any action authorized in this part, including proposing legislation, necessary to improve the general quality of utility and air carrier service to consumers and to bring about specific corrections as may be needed."

### Staffing and Funding for the Consumer Advocate

The point made earlier concerning the provision of sufficient staff and resources bears repeating. Regardless of where the Legislature vests responsibility for the new consumer advocacy function with respect to air carriers, the staffing and funding allocated must be, at

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the very least, adequate to meet the responsibility. The present staff and budget of the Consumer Advocate are fully committed to the existing workload. If the Legislature follows the Bureau's recommendation and assigns responsibility for the new consumer advocacy function to the present Consumer Advocate, the Legislature should allocate additional staff and funds, including sufficient funds for consultants, to the Consumer Advocate for the purposes of carrying out these additional duties.

Related to the issue of sufficient funding and staffing is the Consumer Advocate's ability to attract qualified personnel with expertise in the technical areas with which the Consumer Advocate must work. The Bureau concurs with Consumer Advocate's position that the ability to hire certain staff in exempt positions is critical to obtaining industry experts. Concomitantly, the Bureau agrees with an earlier assessment of the Legislative Auditor in finding that a separate legal staff for the DCA is justified on the basis that "legal work is an integral and continuing part of the normal operations" of the office.<sup>10</sup> Accordingly, the Bureau recommends that the Consumer Advocate be authorized to hire certain technical and legal staff exempt from civil service pay schedules. The following statutory amendments will be necessary to implement this recommendation:

SECTION . Section 269-52, Hawaii Revised Statutes, is amended to read as follows:

"§269-52 **Division of consumer advocacy; personnel.** There shall be a division of consumer advocacy within the department of commerce and consumer affairs to provide administrative support to the director of commerce and consumer affairs acting in the capacity of consumer advocate. The director may employ and at pleasure dismiss an executive administrator, who shall be exempt from chapters 76 and 77, may define the executive administrator's powers and duties and fix the executive administrator's compensation. The director may employ engineers, accountants, investigators, clerks, and stenographers[, and other assistants] as may be necessary for the performance of the consumer advocate's functions, [subject to] in accordance with chapters 76 and 77. The director may employ attorneys and other technical assistants who are necessary for the performance of the consumer advocate's functions and who shall be exempt from chapters 76 and 77."

SECTION . Section 269-53, Hawaii Revised Statutes, is repealed.

"[§269-53 **Legal counsel.** The attorney general and the attorney general's deputies shall act as legal counsel for the consumer advocate.]"

The allocation of funds for consultants and additional staff, including legal staff, for the Consumer Advocate can be included in the executive budget, or a separate appropriation can be made once federal legislation is passed to permit regulation of intrastate air carriers. The Bureau believes that, at a minimum, funds for the following new staff positions will be necessary for the Consumer Advocate to carry out the new responsibilities envisioned: one

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economist, one airline industry specialist, two rate analysts, two engineers, two financial analysts, two attorneys, one paralegal, one consumer education specialist, and two clerk typists. Also, if the Legislature assigns responsibility to the DCA to handle individual consumer complaints, two investigator positions will need to be funded. Mr. Tutto has suggested appropriate SR ratings and salary levels for these new positions which the Bureau believes are adequate at this time.<sup>11</sup> However, depending upon how long it takes before federal legislation is approved allowing regulation of intrastate air carriers, specific salaries may have to be readjusted upward to reflect the current economic realities.

### Endnotes

1. The amendment must still be approved by the full Senate and the House of Representatives. Furthermore, it is opposed by the Clinton Administration.
2. See Chapter 3, note 1 and accompanying text.
3. See Chapter 3, notes 5-9 and accompanying text.
4. See Chapter 3, notes 11-14 and accompanying text.
5. Haw. Rev. Stat., §269-54(d).
6. See Chapter 3, note 15 and accompanying text.
7. See Chapter 3, note 17 and accompanying text.
8. See Chapter 3, notes 18-19 and accompanying text.
9. See Chapter 3, notes 20-30 and accompanying text.
10. See Chapter 3, note 46 and accompanying text.
11. See Chapter 3, at 18-19.

## Appendix A

ACT 332

H.B. NO. 173

A Bill for an Act Relating to Transportation.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that air transportation is uniquely important to the people of the State of Hawaii. The construction of surface transportation systems linking the various islands of Hawaii on the comprehensive basis that prevails elsewhere in the United States is impractical. Accordingly, the people of the State of Hawaii must rely extensively on *air travel for their basic daily personal transportation needs and for the shipment of goods* which are important to their daily lives. Similarly, visitors to the State must often rely on local air travel services provided by Hawaii air carriers for transportation among the various islands. This makes reliable air transportation among the islands of the State vital to the growth of the statewide tourism industry.

The recent downturn in tourism throughout the State, especially on the neighbor islands, has resulted in a dramatic and severe loss of passenger traffic by interisland airlines. The legislature further finds that failure to provide relief to these critical transportation providers is likely to exacerbate the visitor decline on the neighbor islands and have a severe negative impact on businesses statewide. The loss of air transportation among our islands would result in further reduction in employment and the quality of life for the citizens of Hawaii.

The legislature finds that these concerns can best be addressed by the regulation of *air services between points in the State of Hawaii at the state level*. The legislature finds that the current policies that are adopted on the national level may be inappropriate to the unique environment of Hawaii interisland and local service, and that policies adopted by the State of Hawaii in the regulation of this service will not impair implementation of national regulatory goals particularly including safety regulation which shall remain exclusively with the Federal Aviation Administration.

The legislature further finds that financial assistance for those hardest hit by this loss of revenues is not available through a loan from a federal or state agency. Such financial assistance can best be provided through a loan guarantee by the State to assist Hawaii interisland air carriers when other government resources are not available and a loan from a private lending institution can only be secured through the use of a guarantee from the State.

The legislature finds and declares that the issuance of loan guarantees under this Act is in the public interest and for the public health, safety, and general welfare of the State. The purpose of this Act is to:

- (1) Establish a statutory scheme for the regulation of interisland air carriers, to the extent permissible under the Constitution and laws of the United States, and
- (2) Assist Hawaii interisland air carriers whose operations and revenues have been adversely affected by the reduced number of visitors now using their transportation services by authorizing the department of business, economic development, and tourism, through its director, to guarantee loans from private lending institutions.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

### **"CHAPTER HAWAII AIR CARRIERS**

§ -1 **Application of chapter; interstate or foreign commerce.** This chapter shall not apply to commerce with foreign nations, with territories of the United States, or to interstate commerce, except insofar as the application is permitted under the Constitution and laws of the United States.

**§ -2 Definitions.** As used in this chapter:

"Air transportation" means the holding out to the general public of or the undertaking to provide the carriage of persons or property, except for United States mail, by air, for compensation or hire between any pair of points both of which are within the State of Hawaii, unless the carriage is part of the continuous carriage of the persons or property to or from a point outside the State of Hawaii. For the purposes of this chapter the term "continuous carriage" means transportation by air which does not include a stopover of more than twenty-four hours.

"Aircraft" means any craft or other artificial contrivance of whatever description which is used or capable of being used, or intended to be used, as a means of transportation by air.

"Certificate" means a certificate of public convenience and necessity issued under this chapter to a Hawaii air carrier.

"Citizen of the United States" shall have the same meaning as defined in section 101(16) of the Federal Aviation Act of 1958 (49 U.S.C. §1301 et seq.), as amended.

"Commission" means the air carrier commission established pursuant to section -4.

"Control", in reference to a relationship between any person or persons and another person or persons, includes actual as well as legal control, indirect as well as direct control, and the power to exercise substantial influence whether or not exercised.

"Hawaii air carrier" or "carrier" means any person who has received a certificate issued by the commission and who undertakes or holds itself out to the general public as engaging directly or indirectly in the transportation by air of passengers or property, or both, for compensation or hire within the State or between points within the State.

"Rates" includes rates, fares, and charges of whatever kind and nature unless the context indicates otherwise.

"Related company" means a company or persons that directly, or indirectly through one or more subsidiaries, affiliates, or a holding company, controls or is controlled by, or is under common control with, a Hawaii air carrier.

"Transportation of persons" includes every service in connection with or incidental to the comfort or convenience of persons transported, and the receipt, carriage, and delivery of these persons and their baggage.

"Transportation of property" includes every service in connection with or incidental to the transportation of property, including in particular its receipt, carriage, preservation, and delivery, and all incidental services affecting these activities.

**§ -3 Exemptions, generally.** Notwithstanding any other provisions of this chapter, this chapter shall not apply to:

- (1) Persons transporting their own property where the transportation is in furtherance of a primary business purpose or enterprise of that person, except where the transportation is undertaken by a Hawaii air carrier to evade the regulatory purposes of this chapter; or
- (2) Persons engaged in the business of transporting persons solely for sightseeing and other recreational activities not involving point-to-point travel.

**§ -4 Air carrier commission, establishment.** (a) There is established an air carrier commission to assist in the regulation of interisland air carriers pursuant to the purposes of this chapter. The commission shall be placed with the department of transportation for administrative purposes.

(b) The commission shall consist of five members. The commission shall be appointed in the manner prescribed in section 26-34, Hawaii Revised Statutes, except as otherwise provided in this section. The members shall be appointed for terms of six years each, subject to the advice and consent of the senate. The terms of the members first appointed shall be for two, three, four, five, and six years, respectively, as designated by the governor at the time of appointment. The governor shall designate a member of the commission to be chairperson of the commission. Each member shall hold office until the member's successor is appointed and qualified.

(c) In appointing members, the governor shall consider persons who have had experience in transportation, accounting, engineering, government, finance, law, or other

similar fields. No person owning any stock or bonds of any Hawaii air carrier or of any common carrier by air, or having any interest in, or deriving any remuneration from, any Hawaii air carrier or any common carrier by air, shall be appointed as a commissioner; provided that any person who has retired from the service of and no longer holds any position with any common carrier or Hawaii air carrier may be eligible for appointment.

(d) The members of the commission shall receive no compensation for their services on the commission, but shall be reimbursed for actual expenses incurred in the performance of their duties.

§ -5 **Staff.** The air carrier commission may appoint and employ, on a contractual or noncontractual basis not subject to chapters 76 and 77, persons the commission finds necessary for the performance of the commission's functions. The commission shall set forth the powers, duties, and compensation of the staff.

§ -6 **General powers and duties.** The air carrier commission shall have general supervision over all Hawaii air carriers providing air transportation and, to the extent determined by the commission to be necessary to effectuate the purposes of this chapter, over any related company, and shall perform the duties and exercise the powers imposed or conferred upon it by this chapter. The general powers of the commission shall include, but not be limited to:

- (1) Regulating Hawaii air carriers by utilizing, in addition to its other powers, the investigative powers set forth in section -7;
- (2) Establishing reasonable classifications of Hawaii air carriers based upon the nature of the services provided by the carriers, and adopting rules pursuant to chapter 91 to regulate those classes of Hawaii air carriers; and
- (3) Exempting from this chapter, in whole or in part, when determined to be in the public interest, any Hawaii air carrier engaging in air transportation solely with aircraft with a maximum seating capacity of not more than seventeen passengers or maximum cargo capacity of not more than three thousand pounds.

§ -7 **Investigative powers.** (a) The air carrier commission shall have the power to examine the condition of each Hawaii air carrier and, to the extent determined by the commission to be necessary to effectuate the purposes of this chapter, any related companies, including but not limited to:

- (1) The manner in which carriers are operated with reference to the accommodation of the public;
- (2) The fares and rates charged by carriers;
- (3) The value of the physical property of carriers;
- (4) The issuance of stocks and bonds, and the disposition of the proceeds thereof, by carriers;
- (5) The amount and disposition of the income, and all financial transactions, of carriers;
- (6) The business relations of carriers with other persons, companies, or corporations;
- (7) The compliance of carriers with all applicable state and federal laws and with the provisions of their franchise, charter, and articles of association, if any;
- (8) The classifications, rules, regulations, practices, and service of carriers; and
- (9) All matters of every nature affecting the relations and transactions between carriers and the public, persons, or corporations.

(b) Any investigation may be made by the commission on its own motion, or a sworn written complaint that the commission determines sets forth any prima facie cause of complaint.

(c) A related company shall be deemed to have consented to examination and investigation pursuant to this section by entering into or maintaining a control relationship with a Hawaii air carrier.

**§ -8 Certificates of public convenience and necessity.** (a) Except as otherwise provided in this chapter, no person shall engage in air transportation unless the person holds a certificate issued by the air carrier commission authorizing its operation.

(b) Applications for certificates shall be made in writing to the commission. Applications shall be in the proper form and contain the required information, with the proof of service upon the interested parties, as the commission shall require by rule.

(c) A certificate shall be issued to any qualified applicant, authorizing the whole or any part of the operations covered by the application if it is found that the applicant is a citizen of the United States and fit, willing, and able to properly perform the service proposed and to conform to this chapter and the requirements and rules of the commission, and that the proposed service, to the extent to be authorized by the certificate, is required by the public convenience and necessity; otherwise the application shall be denied. The applicant shall have the burden of proof to establish that any proposed service is required by the public convenience and necessity. The commission shall institute an oral evidentiary hearing to consider any application for a certificate that would authorize the holder to use aircraft capable of carrying more than seventeen persons.

(d) Any applicant receiving a certificate under this chapter shall pay upon receipt of the certificate a registration fee and subsequent annual fee that shall be determined by the commission and deposited into the state general fund.

(e) Any Hawaii air carrier engaging in air transportation under a certificate issued by the commission may occasionally deviate from the route over which it is authorized to operate under the certificate under rules adopted by the commission.

**§ -9 Temporary authority.** To enable the provision of service for which there is an immediate and urgent need to a point or points having no Hawaii air carrier service capable of and willing to meet the need, the air carrier commission, in its discretion and without hearings or other proceedings, may grant temporary authority for the service by a Hawaii air carrier. The temporary authority, unless suspended or revoked for good cause, shall be valid for the time the commission shall specify, but for not more than a period of one hundred twenty days for any one immediate and urgent need.

**§ -10 Transfer of certificates of public convenience and necessity, carrier property, and control of carriers.** (a) No Hawaii air carrier shall sell, lease, assign, mortgage, or otherwise dispose of, or encumber any certificate, in whole or in part, or any of its property necessary or useful in the performance of transportation services for the public; nor shall any Hawaii air carrier, by any means, directly or indirectly, merge or consolidate its property, certificates, or any part thereof, with any other carrier, without in each case first having secured from the air carrier commission an order authorizing it to do so, and every such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation, made other than in accordance with an order of the commission authorizing the same, is void and of no effect.

(b) No Hawaii air carrier shall purchase or acquire, take, or hold, any part of the capital stock of any other common carrier without having been first authorized to do so by the commission. Every assignment or transfer of any stock by or through any person to any person, or otherwise, in violation of this section is void and of no effect, and no such transfer shall be made on the books of any air carrier. Nothing herein shall prevent the holding of stock lawfully acquired prior to the effective date of this chapter.

(c) No person shall acquire control of any Hawaii air carrier without first receiving the approval of the commission.

(d) Whenever a transaction is proposed under subsection (a), (b), or (c), the Hawaii air carrier or carriers, or person or persons, seeking approval thereof shall present an application to the commission in the form that the commission shall require. The commission may act upon the application with or without first holding a public hearing; provided that, if requested, the commission shall afford reasonable opportunity for interested parties to be heard. If the commission finds that, subject to the terms and conditions that it shall find to be just and reasonable, the proposed transaction will be consistent with the public interest, the commission shall enter an order approving and authorizing the transaction, upon the terms

and conditions, and with the modifications found to be just and reasonable. The proponent of the transaction within the scope of subsection (a), (b), or (c) shall have the burden of proof to establish that the transaction is consistent with the public interest.

(e) Pending the determination of an application filed with the commission for approval of a consolidation or merger of the properties of two or more Hawaii air carriers, or of a purchase, lease, charter, or contract to operate the properties of one or more Hawaii air carriers, or of an acquisition of control of a Hawaii air carrier, the commission, in its discretion and without hearings or other proceedings, may grant temporary approval, for a period not exceeding one hundred twenty days or for an additional period as the determination of an application may require, of the operation of the Hawaii air carrier properties sought to be acquired by the persons proposing in the pending application to acquire the properties, if it shall appear that failure to grant this temporary approval may result in destruction of or injury to the Hawaii air carrier properties sought to be acquired, or substantial interference with their future usefulness in the performance of adequate and continuous service to the public.

(f) This section shall apply to any transaction entered into or proposed to be entered into by a related company which is determined by the commission to have potential impact upon the related Hawaii air carrier or its operations. A related company shall notify the commission of any such transaction at least sixty days prior to its consummation.

**§ -11 Suspension, change, and revocation of certificates.** (a) Certificates shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as provided in this section.

(b) Any certificate, upon application of the holder thereof, in the discretion of the air carrier commission, may be amended or revoked, in whole or in part. Upon complaint, or on the commission's own initiative, a certificate may be suspended, changed, or revoked, in whole or in part, for wilful failure by the holder or any related company to comply with this chapter, or with any lawful order or rule of the commission, or with any term, condition, or limitation of the certificate. No certificate shall be revoked, except upon application of the holder, unless the holder thereof or any related company wilfully fails to comply, within a reasonable time that shall not be fewer than thirty days and that shall be fixed by the commission, with a lawful order of the commission, rule of the commission, or to a term, condition, or limitation of the certificate or permit.

(c) The right to engage in transportation by virtue of any certificate issued pursuant to section -8 or by virtue of temporary authority granted under section -9 or -10, may be suspended by the commission upon reasonable notice of not fewer than fifteen days to the carrier, but without hearing or other proceedings, for failure to comply by the carrier or any related company, with the terms of the certificate or temporary authority or with any lawful order or rule of the commission regarding the certificate or temporary authority.

**§ -12 Rates, fares, and charges of air carriers.** (a) In the transportation of persons every Hawaii air carrier shall:

- (1) Provide safe and adequate service, equipment, and facilities for the transportation of the passengers; and
- (2) Establish, observe, and enforce just and reasonable:
  - (A) Rates, fares, and charges;
  - (B) Regulations and practices relating to rates, fares, and charges; and
  - (C) Regulations and practices relating to the issuance, form, and substance of tickets; the carrying of personal, sample, and excess baggage; the facilities for transportation; and all other matters relating to or connected with the transportation of passengers as determined by the commission.

(b) In the transportation of property every Hawaii air carrier shall:

- (1) Provide safe and adequate service, equipment, and facilities for the transportation of the property; and
- (2) Establish, observe, and enforce just and reasonable:
  - (A) Rates, charges, and classifications;
  - (B) Regulations and practices relating to rates, charges, and classifications;and

- (C) Regulations and practices relating to the manner and method of presenting, marking, packing, and delivering property for transportation; the facilities for transportation; and all other matters relating to or connected with the transportation of property as determined by the commission.

(c) All charges made for any service rendered by any Hawaii air carrier in the transportation of persons or property or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for the service or any part thereof, is prohibited and declared to be unlawful.

(d) Any person or body politic may make a complaint in writing to the commission that any rate, fare, charge, rule, or practice, in effect or proposed to be put into effect, is or will be in violation of this section. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the commission shall be of the opinion that any individual rate, fare, or charge, demanded, charged, or collected by any Hawaii air carrier, or any rule or practice whatsoever of the Hawaii air carrier affecting the rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum rate, fare, or charge thereafter to be observed, or the lawful rule or practice thereafter to be made effective.

(e) In the exercise of its power to prescribe just and reasonable rates, fares, and charges for the transportation of persons or property by Hawaii air carriers, and to prescribe classifications, rules, and practices relating thereto, the commission shall give consideration, among other factors, to the following:

- (1) The effect of the rates upon the movement of traffic by the Hawaii air carrier or carriers for which the rates are prescribed;
- (2) The need, in the public interest, of adequate and efficient transportation service by the carriers at the lowest cost consistent with the furnishing of the service; and
- (3) The need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, including the operation of service at reasonable load factors, to provide the service.

(f) The commission shall establish and thereafter periodically adjust the recognized level of the fare, rate, or charge. The commission may adjust the recognized level by increasing or decreasing it, as appropriate, by the percentage change in the aggregate cost per available seat mile of similarly situated carriers for fares and per available ton mile for general commodity rates.

(g) The commission shall have no authority to find that any fare, rate, or other charge for service established by any Hawaii air carrier is unjust, unreasonable, or unjustified or to suspend the fare, rate, or other charge on the basis that the fare, rate or charge is too low or too high if the fare, rate, or charge is not more than five per cent higher or ten per cent lower than the recognized level of the fare, rate, or charge. Separate recognized levels shall be established and thereafter periodically adjusted on a peak and off-peak basis for first class fares, normal economy fares, tour basing fares, group fares, kamaaina fares, and for general commodity rates. The commission shall have no authority to find that a contract freight rate is unjust or unreasonable.

**§ -13 Tariffs.** (a) Every Hawaii air carrier shall file with the air carrier commission, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of persons or property. The rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in the form and manner, and shall contain the information that the commission shall prescribe by rule. The commission may reject any tariff filed with it which is not consistent with this section. Any tariff rejected by the commission shall be void and its use shall be unlawful.

(b) No change shall be made in any rate, fare, charge, or classification, or any rule, or practice affecting the rate, fare, charge, or classification, or the value of the service thereunder, specified in any effective tariff of a Hawaii air carrier, except after thirty days

notice of the proposed change filed and posted in accordance with subsection (a). The commission, in its discretion and for good cause shown, may allow the change upon notice less than that specified, or modify the requirements of this section with respect to posting and filing of tariffs, either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

(c) No Hawaii air carrier shall engage in the transportation of persons or property unless the rates, fares, and charges upon which the same are transported by the carrier have been filed and published in accordance with this chapter.

(d) Whenever any schedule is filed with the commission stating a new rate, fare, or charge, for the transportation of persons or property by a Hawaii air carrier or any rule or practice affecting the rate, fare, or charge, or the value of the service thereunder, the carrier may on its own initiative, or shall by order of the commission served prior to the effective date of the schedule, concurrently file an economic justification which shall be prepared under the same form and in the same manner as prescribed by the commission unless the changed fare or rate is within the zone of fare or rate flexibility established pursuant to section -12(g).

Except as provided in section -12(g), the commission may upon complaint of any interested person or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, enter upon a hearing concerning the lawfulness of the rate, fare, or charge, or the rule or practice, and pending the hearing and decision the commission may suspend the operation of the schedule and defer the use of the rate, fare, or charge, or the rule or practice, by delivering to the affected carrier or carriers, not later than five days prior to the effective date of the schedule, a statement in writing of its reasons for the suspension. The commission shall have up to six months from the date of ordering a hearing to investigate the lawfulness of the rate, fare, or charge, to complete its investigation. If the commission fails to issue a final order within the six-month period then the changes proposed by the carrier shall go into effect. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, or practice, is just and reasonable. In exercising its authority under this subsection and subsection (e), the commission shall consider the factors regarding reasonableness set forth in section -12(e).

(e) When a fare or rate increase application is filed, the commission, in its discretion, may authorize temporary increases in rates, fares, and charges, upon a prima facie showing by a Hawaii air carrier that such fares, rates, or charges are just and reasonable; provided that the commission by order shall require the carrier to keep an accurate account of all amounts received from the increase. The commission, after hearing and decision, shall require a carrier to refund the portion of the increased rates or charges found to be not justified to persons in whose behalf the amounts were paid.

**§ -14 Investigation of unfair or deceptive practices.** The commission, upon its own initiative or upon complaint, if it considers the action to be in the public interest, may investigate and determine whether any Hawaii air carrier has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the commission finds, after notice and hearing, that a carrier is engaged in unfair or deceptive practices or unfair methods of competition, it shall order the carrier to cease and desist from the practices or methods of competition. Notwithstanding section 480-2(d), such complaint may be made by any person, a government agency, or competing carrier and may relate to practices involving advertising and marketing, service and ancillary services, pricing or any other aspect of the operations of a Hawaii air carrier.

**§ -15 Issuance of securities; execution of leases.** A Hawaii air carrier, with the approval of the air carrier commission, may issue stocks and stock certificates, bonds, notes, and other evidences of indebtedness, payable at periods of more than twelve months after the date thereof, and enter into long-term leases of more than five years and leverage leases, for the following purposes:

- (1) For the acquisition or use of property;

- (2) For the construction, completion, extension, or improvement of or addition to its facilities or service;
- (3) For the discharge or lawful refunding of its obligations; and
- (4) For the reimbursement of moneys actually expended from income or from any other moneys in its treasury not secured by or obtained from the issue of its stocks or stock certificates, or bonds, notes, or other evidences of indebtedness, except maintenance of service, replacements, and substitutions not constituting capital expenditure in cases where the air carrier has kept its accounts for the expenditure in a manner as to enable the commission to ascertain the amount of moneys expended and the purposes for which the expenditures were made, and the sources of the funds in its treasury applied to the expenditures.

A Hawaii air carrier may not issue securities, nor enter into long-term leases of more than three years and leverage leases, to acquire or use property or to construct, complete, extend, improve, or add to its facilities or service, if the commission determines that the proposed transaction will have a material adverse effect on the carrier's operations. No carrier shall repurchase or reissue its own common stock without the approval of the commission.

This section shall apply to a transaction involving a related company to the extent that the commission determines that the transaction may have a potential impact upon the relevant Hawaii air carrier or its operations. A related company shall notify the commission of any transaction at least sixty days prior to its consummation.

**§ -16 Accounts, records, and reports.** The air carrier commission may require annual, periodic, or special reports from all Hawaii air carriers and related companies. The commission shall prescribe the manner and form in which the reports shall be made.

**§ -17 Unlawful actions; penalties.** (a) Any person knowingly and wilfully violating any provision of this chapter, or violating any certificate for which a penalty is not otherwise herein provided, shall be fined not less than \$500 nor more than \$2,000 for the first offense, and not less than \$1,000 nor more than \$10,000 for any subsequent offense. Each day of the violation shall constitute a separate offense.

(b) Any person, whether carrier, shipper, or consignee, or any officer, employee, agent, or representative thereof, who knowingly offers, grants, or gives, or solicits, accepts, or receives any rebate, concession, or discrimination in violation of any provision of this chapter, or who by means of any false statement or representation or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, knowingly and wilfully assists, suffers, or permits any person or persons, natural or artificial, to obtain transportation of persons or property subject to this chapter for less than the applicable rate, fare, or charge, or who knowingly and wilfully by any such means or otherwise fraudulently seeks to evade or defeat regulations in this chapter provided for Hawaii air carriers, shall be fined not less than \$100 nor more than \$5,000 for each offense.

(c) Any person who knowingly and wilfully divulges any fact or information which may come to the person's knowledge during the course of any examination or inspection made under authority of this chapter, except as the person may be directed by the commission or by a court or judge of competent jurisdiction, shall be guilty of a misdemeanor, and shall be subject to a fine of not more than \$1,000 or imprisonment for not exceeding one year, or both.

(d) Any Hawaii air carrier or related company, or any officer, agent, employee, or representative thereof, who shall knowingly and wilfully fail or refuse to comply with any provision of this chapter, or any rule, regulation, filed tariff, or requirement or order thereunder, shall pay a civil penalty to the State in the sum of not less than \$100, nor more than \$5,000 for each offense, and, in the case of continuing violation, a penalty not to exceed \$1,000 for each additional day during which the failure or refusal continues. A penalty shall become due and payable when the person incurring it receives a notice in writing from the air carrier commission, reasonably describing the violation and advising that the penalty is due.

Penalties assessed against a related company may at the discretion of the air carrier commission be collected from the related Hawaii air carrier.

(e) The commission may compromise any fine or civil penalty taking into consideration, among other factors, the impact on consumers and remedial measures to be taken.

**§ -18 Hearings.** (a) Unless otherwise provided in this chapter, all hearings, investigations, and proceedings shall be governed by chapter 91 and by rules adopted by the air carrier commission, and in the conduct thereof, the rules of evidence need not be applied; provided that in all evidentiary hearings conducted pursuant to chapter 91 in which a person has the burden of:

- (1) Justifying the reasonableness of its rates, fares, charges, or classifications;
- (2) Establishing the need for service in the public convenience and necessity or of demonstrating that a proposed transaction is consistent with the public interest; or
- (3) Proving the reasonableness of expenditures, contracts, leases, or other transactions between the carrier and corporate affiliates of the carrier, the burden shall be satisfied only if the reliable, probative, and substantial evidence is clear and convincing. No informality in any hearing, investigation, or proceeding, or in the manner of taking testimony shall invalidate any order, decision, or rule made, approved, or confirmed by the commission.

(b) Complaints may be made, in writing, by the commission on its own motion or by any person or body politic setting forth any act or thing done, or omitted to be done by any person subject to the commission's jurisdiction, including any rule, rate, or charge, heretofore established or fixed by or for any Hawaii air carrier, in violation or claimed to be in violation, of any law or any order or rule of the commission.

**§ -19 Review and appeals.** (a) Within ten days after the issuance of any final decision or order of the commission under this chapter, any party aggrieved by the action of the commission may submit a petition to the director of transportation requesting the director to review the decision or order. The filing of any petition shall stay the effectiveness of the decision or order until the director has issued a final decision on review. The director may affirm in whole or in part the order or decision of the commission or remand it to the commission for further consideration, in which case the order or decision shall remain stayed until it is again submitted to and approved by the director.

(b) An appeal from an order of the air carrier commission under this chapter, whether or not reviewed by the director, shall be made to the supreme court in the manner and within the time provided by chapter 602 and the rules of court; provided that the order is final. If the order is preliminary, an appeal may be made pursuant to section 91-14(a). The appeal shall not of itself stay the operation of the order appealed from, but the court may stay the order after a hearing upon a motion therefor, and may impose such conditions as it may deem proper as to giving a bond and keeping the necessary accounts or otherwise securing restitution of the excess charges, if any, made during the pendency of the appeal in case the order appealed from should be sustained, revised, or modified, in whole or in part.

(c) Any party injured by a violation of this chapter may file an action to enjoin such violation before any court of general jurisdiction of the State of Hawaii.

**§ -20 Existing service.** (a) As of the effective date of enactment of all required federal legislation, any person providing air transportation with turnaround service between two points, both of which are within the State of Hawaii pursuant to authority granted by the United States Department of Transportation, shall be deemed qualified and shall be issued a certificate pursuant to this chapter.

(b) For the purposes of this section, "turnaround service" means the operation of an aircraft that only serves points within the State of Hawaii."

**SECTION 3.** The legislative reference bureau shall conduct a study to assess the need for a consumer advocate to represent, protect, and advance the interests of all consumers before the air carrier commission. The study shall include, but not be limited to, the following:

- (1) Recommendations on the general powers and duties of the consumer advocate;
- (2) An assessment of staffing and funding requirements;
- (3) An assessment of whether this responsibility may be incorporated under the purview of the present consumer advocate or if a separate consumer advocate is recommended, where this position may be placed for administrative purposes; and
- (4) Proposed legislation necessary to implement the recommendations.

The legislative reference bureau shall report its findings and recommendations to the legislature no later than thirty days before the convening of the regular session of 1994.

SECTION 4. Loans guaranteed by the department. (a) The department of business, economic development, and tourism, through its director, may guarantee up to ninety per cent of the principal balance of a loan made by a private lending institution to a Hawaii air carrier providing the carriage of persons or property by air for compensation or hire between any two points, both of which are within the State of Hawaii; provided that at no time shall the aggregate amount of the State's liability, contingent or otherwise, on loans guaranteed by this Act exceed \$12,600,000.

(b) The loan guarantee shall be for a term of not more than seven years.

(c) All loans guaranteed under this Act shall be collateralized on a basis at least equal to the outstanding balance of the loan guaranteed; provided that as part of the collateral, the Hawaii air carrier shall deposit, in cash, an amount equal to twenty per cent of the principal balance of the loan into the Hawaii interisland airline loan guarantee trust fund to be held by the State in an interest bearing account. The balance of the collateral shall be in the form of real property interests or such other marketable assets as may be approved by the director. The collateral shall not be subordinated. All parts and equipment pledged as collateral shall be subject to a buyback or re-stock agreement such that the value of the collateral or method of securing payment from the collateral shall be guaranteed.

(d) A loan guarantee shall be considered only when there is evidence that the loan is not available from other sources. The loan shall be deemed to be available unless the Hawaii air carrier provides proof satisfactorily to the director of refusal of all or a part of the required loan from at least three financial institutions, one of which has a current business relationship with the carrier. Proof of refusal shall contain the date of application, amount, purpose, and the financial institutions' reasons for not granting the desired loan. The financial institutions' refusal to advance credit shall not be considered the full test of the unavailability of credit. Where the director has reason to believe that credit is otherwise available from sources other than such financial institutions, the loan applied for shall not be granted notwithstanding the receipt of a written refusal from such financial institutions.

(e) The department shall conduct a due diligence examination of the Hawaii air carrier applying for a loan guarantee under this Act. The department shall not approve a loan guarantee unless the applicant provides reasonable assurance that the loan can and will be repaid pursuant to its terms. Reasonable assurance of repayment shall be based upon consideration of the applicant's record of past earnings or projections of future earnings.

(f) The loan guarantee may not be granted unless the Hawaii air carrier secures agreements from its principal creditors that the principal creditors shall withhold any collection actions which may result in the Hawaii air carrier ceasing operations for a minimum of two years from the effective date of the guarantee.

(g) Funds provided by the guaranteed loan may be used for working capital except that loan guarantees shall not be granted if the direct or indirect purpose or result of granting the loan would be to:

- (1) Satisfy debts arising prior to the effective date of the guarantee;
- (2) Provide funds, directly or indirectly, for payment, distribution, or as a loan to owners, partners, or shareholders of the borrower;
- (3) Provide funds for wage or salary increases; or
- (4) Replenish funds heretofore used for any of the above purposes in anticipation of applying for a loan guarantee under this Act.

(h) The department may set additional terms and conditions on the granting of the loan guarantee. When the application for a guaranteed loan has been approved by the department, the department shall issue to the lender a guarantee for the percentage of the loan guaranteed. The lender shall collect all payments from the borrower and otherwise service the loan.

(i) Loan guarantees shall not be granted unless the carrier raises new equity equal to the amount of the guarantee in a form acceptable to the department.

(j) In return for the department's guarantee, the lender shall remit, out of interest collected, a guarantee fee on the unpaid principal balance of the guaranteed portion of the loan to the State, provided that this fee shall not be added to any amount which the borrower is obligated to pay. The department shall determine the amount of the guarantee fee.

(k) The applicant shall:

(1) Expend the loan in accordance with the provisions of this Act;

(2) Keep the department informed of any and all changes in the security and other major changes in the carrier's operation; and

(3) Promptly provide information and documents to the department upon request.

(l) Upon retirement of the loan or under other conditions satisfactory to the director of business, economic development, and tourism, the deposit made into the Hawaii interisland airline loan guarantee trust fund by the Hawaii air carrier shall be returned to the Hawaii air carrier in accordance with the terms of the agreement with the carrier.

In the event of a default by the Hawaii air carrier, the lender shall notify the department of the default, and shall be entitled to receive all moneys deposited into the Hawaii interisland airline loan guarantee trust fund by the Hawaii air carrier. The lender shall commence all actions necessary to protect or enforce its rights to the properties used as collateral to secure the loan guarantee and shall prosecute such actions to the fullest extent available under law.

(m) During the life of a loan guarantee, the carrier shall submit to the department audited annual financial statements consisting of a balance sheet, income statement, and a statement of cash flows. These reports shall be submitted no later than four months after the close of the carrier's fiscal year. The department may require the carrier to file interim financial statements and reports as deemed necessary by the director.

SECTION 5. Pursuant to Article VII, section 13, clause 8, of the State Constitution that states: "Bonds constituting instruments of indebtedness under which the State or any political subdivision incurs a contingent liability as a guarantor, but only to the extent the principal amount of such bonds does not exceed seven per cent of the principal amount of outstanding general obligation bonds not otherwise excluded under this section; provided that the State or political subdivision shall establish and maintain a reserve in an amount in reasonable proportion to the outstanding loans guaranteed by the State or political subdivision as provided by law," the legislature finds and declares that the moneys deposited into the Hawaii interisland airline loan guarantee trust fund pursuant to section 4(c) of this Act, satisfies the reasonable reserve requirement of the State Constitution.

SECTION 6. There is created a trust fund in the state treasury to be known as the Hawaii interisland airline loan guarantee trust fund which shall serve as the reserve for all loans guaranteed under this Act.

SECTION 7. The Hawaii air carrier shall deposit, in cash, an amount equal to twenty per cent of the principal balance of the loan guaranteed under this Act into the Hawaii Interisland Airline Loan Guarantee trust fund. This sum shall, when and if necessary, be expended by the department of business, economic development, and tourism for the purposes of this Act.

SECTION 8. There is appropriated out of the general revenues of the State of Hawaii the sum of \$100,000, or so much thereof as may be necessary for fiscal year 1993-94, to conduct due diligence examinations of any Hawaii air carrier applying for a loan guarantee from the State of Hawaii, and monitoring and auditing, and the administration of the Hawaii interisland airline loan guarantee trust fund.

SECTION 9. The sum appropriated shall be expended by the department of business, economic development, and tourism for the purposes of this Act.

SECTION 10. The provisions of this Act shall be performed to the extent permissible under the United States Constitution and federal law without causing a violation of the United States Constitution, federal grant agreements, federal law, or federal regulations.

SECTION 11. This Act shall take effect upon its approval; provided that section 2 shall take effect upon the enactment of federal legislation permitting implementation of that section; provided further that section 8 shall take effect on July 1, 1993; provided further that the collateral required by section 4(c) of this Act is deposited into the Hawaii interisland loan guarantee trust fund on such terms and conditions acceptable to the director of the department of business, economic development, and tourism, by June 30, 1993; and provided further that this Act shall be repealed on June 30, 2002.

(Approved June 28, 1993.)

**Note**

1. So in original.

## Appendix B

JOHN WAIHEE  
Governor



CLIFFORD K. HIGA  
Director of  
Commerce and Consumer Affairs

STATE OF HAWAII  
DIVISION OF CONSUMER ADVOCACY  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
P O BOX 541  
HONOLULU, HAWAII 96809

CHARLES W. TOTTO  
Executive Director

November 4, 1993

Ms. Charlotte A. Carter-Yamauchi  
Researcher  
Legislative Reference Bureau  
State Capitol  
Honolulu, HI 96813

RE: CONSUMER ADVOCATE FOR LOCAL AIRLINES INDUSTRY

Dear Ms. Carter-Yamauchi:

Thank you for allowing me the opportunity to comment for your study on a consumer advocate for interisland airlines travel. I will focus my comments on four areas: (1) the background of the Division of Consumer Advocacy under current law, (2) recommendations for the general powers and duties of the consumer advocate for airline customers, (3) an assessment of the staffing and funding needs, and (4) proposed legislation necessary to implement the recommendations in (2) and (3). For clarity's sake, when I refer to the Consumer Advocate for utility customers, I will use the acronym "CA-U." For the Consumer Advocate for airline customers, I will use "CA-A."

### A. BACKGROUND

It is appropriate to give you some general background as to the current responsibilities of the CA-U. As you are aware, the CA-U is mandated to represent, protect and advance the interest of all consumers of utility and transportation services in Hawaii. Our staff must "watchdog" several different industries--electric power, gas, telecommunications, carriage of property or persons over water or land, privately owned water and sewer companies, and the like. It also requires that we regularly represent consumer interests in contested cases (i.e. litigation) and rulemaking proceedings before the Public Utilities Commission (PUC) for state issues and the Federal Communications Commission and the Federal Maritime Commission for interstate issues. We also offer and comment on all legislation

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dealing in our subject areas before the State legislature and, sometimes, Congress.

Although our staff and funding have suffered cut backs like other state agencies, for fiscal year 1993, our budget consisted of approximately \$1,215,000. Our current technical/professional staff positions consist of one economist, two statisticians (of which one is vacant and unfunded), one rate analyst, three utility engineers (of which one is vacant), four financial analysts (of which one is vacant and one is vacant and unfunded), a utilities administrator, and a transportation administrator. All positions, except mine, are civil service.

All current employees are fully committed and utilized in handling utility and water or land transportation cases. In fact, we constantly face a shortage of qualified staff and resources. This hampers us in our current workload. None of our staff have any experience or expertise in the airlines industry.

One of the common threads that binds our ability to regulate such diverse industries is that all the licensees are subject to rate base, rate of return regulation or some variation of it. I note that the type of rate regulation to be used by the air carrier commission is not stated in Act 332, Section \_\_\_\_\_-12.

A venture into airline regulation should not be assumed to be a casual exercise. Besides not knowing the basic means of rate regulation that will be employed, there are other distinctions that differentiate the airlines industry from other industries we help regulate. First, the airlines industry in Hawaii is made up of several passenger and property carriers that serve the same areas. Contrast this with the electric utilities that do not cross the boundaries of their respective service territories. The degree to which one air carrier competes with another will make rate regulation very complex.

Second, the cost factors for plant (e.g. hangars, aircraft, machinery, etc.) and operations and maintenance (e.g. fuel costs, labor, materials) are unique to this industry. Little knowledge can be transferred effectively from say, telecommunications, to the airlines industry. As a result, our staff will need much training.

This brings me to my third point--knowledge of the industry may be difficult to obtain for the regulatory context. Airlines rate regulation ceased about 15 years ago. I am concerned whether there is a pool of potential consultants with real

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expertise in this area, much less qualified potential employees in Hawaii.

Finally, I am informed that when the airlines were regulated, many other issues besides rates were included in the regulatory arena. Some examples are the quality of service (e.g. lost/damaged baggage claims, bumping, on-time records, etc.) and routing (e.g. which carriers will service profitable routes as opposed to unprofitable routes). Similar issues appear contained in Act 332, Section \_\_\_\_\_-7.

**B. RECOMMENDATIONS ON THE GENERAL POWERS AND DUTIES OF THE CA-A.**

As we discussed in our meeting, our powers and duties are defined in Section 269-51, et seq. We find that these are generally acceptable for the purposes of our regulatory work. I can point to two caveats, however. First, the CA-U does not currently have subpoena power. To some degree this is a result of the nature of the discovery process historically used for utility and transportation regulation, which limits discovery to written questions and answers, outside of exceptional circumstances. Potentially, a difficulty exists if the CA-U seeks information that needs to be taken through an oral deposition. Other consumer agencies are granted subpoena power (e.g. Office of Consumer Protection and Regulated Industries Complaints Office through the Director of the Department of Commerce and Consumer Affairs). You also mentioned, however, that the Director or the Attorney General may be able to use their subpoena power on our behalf.

Second, the CA-U does not have the duty to represent individual consumers before regulatory agencies. Instead, the PUC handles formal and informal complaints for intrastate matters. The rationale for this is that the Commission is more likely to obtain adequate responses from a utility in contrast to requests from the utilities' adversary, the CA-U. If investigative powers for individual complaints from the public are given to the CA-A, then investigators with appropriate expertise will have to be included on our staff.

**C. ASSESSMENT OF STAFFING AND FUNDING NEEDS.**

Given that our current small staff and budget is totally exhausted by utility and transportation matters, I will suggest

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the following staff positions, "SR" levels and funding which are in addition to our current allocations:

<u>Position</u>	<u>SR Rating</u>	<u>Salary Range</u>
<u>Economist</u> --evaluate economic trends in industry and determine rate of return.	SR-26-28	\$ 38,100-\$ 42,900
<u>Airline Industry Specialist</u> --to coordinate staff analysis and provide knowledge of costs of running regulated carrier.	Exempt	60,000
<u>Rate Analyst</u> --to determine fairness of proposed rates, tariffs, and revenues collected by airlines.	SR-26	38,100
<u>Engineer</u> --focus on safety and engineering issues (e.g. aircraft cost and capital projects)	SR-26	38,100
<u>Two Financial Analysts</u> --to review expenses and revenue requirement of carriers.	SR-26 SR-24	38,100 35,200
<u>Two Clerk-Typists</u> --for support for above staff.	SR-08 SR-08	17,700 17,700
<u>Consumer Education Specialist</u> --to inform and educate the public of rights as consumers.	SR-26	38,100
<u>Two Investigators</u> *--to research and resolve claims by individuals against carriers, should these duties be allocated to the CA-A.	SR-26 SR-22	38,100 31,300
	TOTAL:	\$390,500-\$395,300

\* Necessary only if CA-A, as opposed to air carrier commission, handles individual complaints.

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In addition to the foregoing, provision should be made for a minimum \$500,000 in consulting funds, especially in the first years of regulation. It will be critical that Hawaii use the most experienced and skillful analysts and consultants in developing rules, practices, procedures and decisional law to protect the rights of consumers and to implement an appropriate regulatory scheme. I anticipate that consultants would be heavily relied upon until the staff is trained and obtains some level of expertise and experience.

Today, in regulating utility and transportation providers, we use a combination of staff and consultants. This has led to a very successful mix--staff provides long term consistency and experience, while consultants are exceptional at advocating in issues that are new to our state and its utilities. We are in the process of seeking legislation that would allow us to hire exempt employees, also. See, H.B. No. 1882, H.D. 1; S.B. No. 1704. I feel this step is critical because only in this way will we be able to attract personnel with industry expertise, whether its in telecommunications or the airlines industry. To date, industry experts are not attracted to state employment because of the relatively low wages. Exempt employees would greatly complement our civil service generalists.

Currently, the CA-U is represented by three Deputy Attorneys General (AG), who allocate 100% of their time to CA-U work. This number has been and is insufficient as evidenced by our need to annually hire outside counsel (for telecommunications matters at the national level) since well before my time here (1988). I suspect that the AG's office would need to assign the equivalent of at least one attorney and a paralegal solely dedicated to the air carrier industry. Alternatively, the CA-A would need to be statutorily enabled and funded to hire its own staff attorneys or the CA-A would need to be funded to hire special deputy attorneys general.

Finally, adequate staffing and funding will be crucial to the CA-A's success. I note that Act 332, Section \_\_\_\_\_-13(d), constrains the commission to investigate and decide rate issues within six months, or else the rate goes into effect. This time period is extremely short relative to similar limits for utility cases. Under Sectionan269-16(d) an interim order by the PUC must be entered within ten months of the filed, complete application. Moreover, rates are not assumed to be reasonable at the expiration of that time period. The CA-U has difficulty meeting

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the PUC time constraints with its current staff. The six month period will be even more taxing on resources, if a thorough review is to be conducted.

I will discuss a funding source in the next section.

**D. PROPOSED LEGISLATION NECESSARY TO IMPLEMENT THE ABOVE RECOMMENDATIONS.**

First, enabling legislation permitting the CA-A to represent the public in local airlines matters will be needed. Presumably, this could be done through an extension to air carriers of our powers and duties in Chapter 269.

Second, consideration should be given to whether the Consumer Advocate should be provided subpoena power for air carrier issues, if not for all utility and transportation companies.

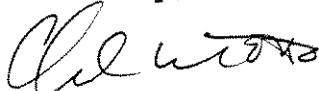
Third, the office needs the ability to hire exempt employees.

Fourth, and of paramount importance, is the need for a funding source for the CA-A, if not also for the commission. I suggest that a special fund be created and the funds collected be dedicated to the effective regulation of the industry. One means to do this is by setting a use fee that is incorporated into the cost of airline carriage. An example of this is Section 269-30, which sets a public utility fee at a percentage of gross income from the public utility business. This fee is passed on to consumers through utility rates. Although I do not know the annual revenues for the air carriers, I would imagine that the revenues needed to support regulation would be relatively small, especially on a per ticket or per pound of property carried basis. We have legislation pending to create special funds for the PUC and the CA-U in H.B. No. 1888, H.D. 2, S.D. 2 and S.B. No. 1709, S.D. 2, H.D. 2, which I can provide to you as models of my proposal. User funding makes sense because the users stand to benefit from proper consumer protection and rate regulation.

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Thank you, again, for considering our comments. Of course, should you have any questions, please do not hesitate to contact me at 586-2770.

Sincerely,



Charles W. Tutto  
Executive Director

cc: Mr. Clifford Higa  
Ms. Susan Doyle  
Ms. Cheryl Kikuta

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## A BILL FOR AN ACT

RELATING TO PUBLIC UTILITY REGULATION.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1 SECTION 1. Chapter 269, Hawaii Revised Statutes, is  
2 amended by adding a new section to be appropriately designated  
3 and to read as follows:

4 "§269- Public utilities commission and consumer  
5 advocacy special fund. (a) There is established in the state  
6 treasury a special fund to be administered by the public  
7 utilities commission. The proceeds of the fund shall be  
8 allocated by the public utilities commission in accordance  
9 with subsection (b) to the public utilities commission and the  
10 division of consumer advocacy for all expenses incurred in the  
11 administration of chapters 269, 271, and 271G.

12 (b) All moneys allocated by the public utilities  
13 commission from the fund to finance the operations of the  
14 commission and the division of consumer advocacy shall be in  
15 accordance with appropriations passed by the legislature.

16 (c) All moneys appropriated to, received, or collected  
17 by the public utilities commission and the division of  
18 consumer advocacy that are not pledged, obligated, or required  
19 by law to be placed in any other special fund or expended for

1 any other purpose, shall be deposited into the special fund;  
2 including, but not limited to, moneys received or collected by  
3 the public utilities commission under sections 92-21, 269-28,  
4 269-30, 271-27, 271-36, and 271G-19.

5 (d) The commission shall submit a report to the  
6 legislature detailing all funds received and all moneys  
7 disbursed out of the special fund prior to the convening of  
8 each regular session.

9 (e) All moneys in excess of \$1,000,000 remaining on  
10 balance in the special fund on June 30 of each odd-numbered  
11 year shall lapse to the credit of the state general fund."

12 SECTION 2. Section 269-30, Hawaii Revised Statutes, is  
13 amended to read as follows:

14 "**§269-30 Finances; public utility fee.** [Section] (a)  
15 Sections 607-5 to 607-9 shall apply to the public utilities  
16 commission and each commissioner, as well as to the supreme  
17 and circuit courts, and all costs and fees paid or collected  
18 hereunder shall be deposited [with] by the director of finance  
19 [of the State to the credit of the general fund.] into the  
20 special fund established for the public utilities commission  
21 and the division of consumer advocacy under section 269- .

22 (b) There shall also be paid to the commission in [each  
23 of] the months of July and December [in] of each year, by each

1 public utility which is subject to investigation by the  
2 commission, a fee which shall be equal to [one-eighth] one-  
3 fourth of one per cent of the gross income from the public  
4 [utility] utility's business [carried on by the public  
5 utility] during the preceding year, or the sum of \$15,  
6 whichever is greater. This fee shall likewise be deposited  
7 [with] by the director of finance [of the State to the credit  
8 of the general fund.] into the special fund established for  
9 the public utilities commission and the division of consumer  
10 advocacy under section 269- .

11 (c) Each public utility paying a fee under subsection  
12 (b) may impose a surcharge to recover the amount paid above  
13 one-eighth of one per cent of gross income. The surcharge may  
14 be imposed by the utility upon thirty days notice to the  
15 public utilities commission. The surcharge imposed shall not  
16 be subject to the notice, hearing, and approval requirements  
17 of this chapter. Unless ordered by the public utilities  
18 commission, the surcharge shall be imposed only until the  
19 public utility's next rate case; provided that the surcharge  
20 shall be subject to refund with interest at the public  
21 utility's authorized rate of return on rate base if the  
22 utility collects more money from the surcharge than it  
23 actually pays due to the increase in the fee to one-fourth of  
24 one per cent."

1 SECTION 3. Section 271-36, Hawaii Revised Statutes, is  
2 amended to read as follows:

3 "§271-36 Fees and charges. (a) Every common carrier by  
4 motor vehicle and every contract carrier by motor vehicle,  
5 shall pay to the commission in April in each year, a fee which  
6 shall be equal to [one-eighth] one-fourth of one per cent of  
7 the gross revenues from the carrier's business during the  
8 preceding calendar year, or the sum of \$10, whichever is  
9 greater. Gross revenues include all revenues received from  
10 services connected with or incidental to transportation  
11 services as described in section 271-4(6), and (7).

12 (b) The commission shall establish fair and reasonable  
13 fees for the following applications which shall be paid to the  
14 commission at the time of submission [to it] of the  
15 applications:

- 16 (1) Applications for certificates and permits as  
17 provided by sections 271-12 and 271-13.
- 18 (2) Applications for extensions of certificates as  
19 provided by section 271-12(d).
- 20 (3) Applications for temporary certificates and permits  
21 as provided by section 271-16.
- 22 (4) Application for authority to [sell, lease, assign,  
23 encumber, merge, etc., the] convey property

1           necessary or useful in the performance of duties to  
2           the public or to transfer certificates or permits or  
3           to purchase motor carrier stock, [etc.,] as provided  
4           in section 271-18.

5           (c) The commission may charge an amount it deems  
6 necessary and reasonable to defray the cost of supplying to  
7 the carriers and the public the application forms and other  
8 forms, schedules, tariffs, copies of [regulations,] rules, and  
9 other pamphlets and materials it provides either by the  
10 individual copy or in bulk.

11          (d) All of the fees and charges collected under this  
12 section shall be [paid into the treasury of the State.]  
13 deposited into the special fund established for the public  
14 utilities commission and the division of consumer advocacy  
15 under section 269- ."

16          SECTION 4. There is appropriated out of the general  
17 revenues of the State of Hawaii the sum of \$1,000,000, or so  
18 much thereof as may be necessary for fiscal year 1993-1994, to  
19 be deposited into the special fund established for the public  
20 utilities commission and the division of consumer advocacy for  
21 purpose of ensuring continuous services by the commission and  
22 the division. The general funds appropriated in this section  
23 shall be allocated to the public utilities commission and the

1 division of consumer advocacy until sufficient moneys are  
2 available in the special fund to cover the operating costs of  
3 the commission and the division.

4       SECTION 5. The public utilities commission shall open a  
5 docket to examine the telecommunications infrastructure in the  
6 State of Hawaii. The purpose of this docket shall be to  
7 examine telecommunication related needs, technology and  
8 infrastructure. The commission shall determine whether the  
9 consumer, business, government, education, and economic  
10 development interests of Hawaii are being served or impeded by  
11 the current telecommunications services, regulations, and  
12 providers.

13       The commission, as part of this docket, shall determine  
14 if the current telecommunications service providers are able  
15 to provide integrated services digital networking to  
16 consumers, business, and government as a universal service.  
17 If the current telecommunication service providers are unable  
18 to offer integrated services digital networking capability to  
19 residents and businesses of Lihue, Honolulu, Wailuku, Kahului,  
20 Kona, and Hilo within a period of one year, the commission  
21 shall adopt a policy of competition to assure that integrated  
22 services digital networking can be deployed to consumers,  
23 businesses, and government statewide within a period of three

1 years. Any competitive policy shall include the requirement  
2 for a contribution from the new competitive telecommunication  
3 service providers to achieve the objective of universal  
4 service. Any integrated services digital networking tariffs  
5 shall be structured so as to achieve the purposes of universal  
6 telecommunication service for residential consumers.

7 The commission shall submit to the legislature a report  
8 of findings, recommendations, and competition policy adopted  
9 pursuant to this section, no later than twenty days prior to  
10 the convening of the 1994 regular session.

11 SECTION 6. To ensure long-term competition for  
12 interisland, intra-lata telecommunications and to enable the  
13 introduction of advanced telecommunications services to the  
14 neighbor islands in a timely manner, the Hawaii information  
15 network corporation, in collaboration with the board of land  
16 and natural resources, shall issue a competitive bid to award  
17 to two companies the right to install and operate interisland  
18 fiber optic based telecommunication transport facilities and  
19 services through state lands and rights-of-way. The bid shall  
20 require the two companies to:

21 (1) Share the direct costs of an equal number of fiber  
22 optic strands and to include a minimum of four  
23 strands of fiber that will be provided to the State

1 of Hawaii at no cost and be terminated at no more  
2 than two locations on the islands of Kauai, Maui,  
3 Hawaii, Oahu, and Molokai as specified by the Hawaii  
4 information network corporation;

5 (2) Require that the islands of Kauai, Maui, Hawaii,  
6 Oahu, and Molokai are included in the fiber optic  
7 transport facilities and services plan;

8 (3) Submit a request for a certificate of public  
9 convenience and necessity within three months of the  
10 award of the bid; and

11 (4) Develop a joint operating agreement to share equally  
12 in the costs of deploying the fiber optic network to  
13 locations specified.

14 No interexchange carriers, inter-lata long distance  
15 communication services providers may tender offers for  
16 interisland, intra-lata telecommunication facilities.  
17 Interexchange carriers may be suppliers of technology and  
18 services for the network.

19 Funds generated through the bid shall be deposited into  
20 the state general fund. The board of land and natural  
21 resources shall enforce all provisions of this section and  
22 shall not permit activities or convey rights contrary to this  
23 section, or state law, rules, or both.

1 SECTION 7. Upon award of the bid by the Hawaii  
2 information network corporation and the receipt of a request  
3 for a certificate of public convenience and necessity, the  
4 public utilities commission shall:

- 5 (1) Issue a certificate of public convenience and  
6 necessity to the interisland, intra-lata  
7 telecommunication service providers;
- 8 (2) Ensure that the two carriers are provided virtual or  
9 physical co-location facilities to the local  
10 exchange carrier and that consumers are provided  
11 equal access to the alternate interisland, intra-  
12 lata telecommunication services; and
- 13 (3) Ensure that a universal service access rate be  
14 established for interisland, intra-lata  
15 telecommunications so as to achieve the purposes of  
16 universal telecommunication services to residential  
17 consumers.

18 SECTION 8. Statutory material to be repealed is  
19 bracketed. New statutory material is underscored.

20 SECTION 9. This Act shall take effect upon its approval;  
21 provided that section 4 shall take effect on July 1, 1993.

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## A BILL FOR AN ACT

RELATING TO PUBLIC UTILITY REGULATION.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1       SECTION 1. Chapter 269, Hawaii Revised Statutes, is  
2 amended by adding a new section to be appropriately designated  
3 and to read as follows:

4       "§269-     Public utilities commission special fund. (a)

5 There is established in the state treasury a public utilities  
6 commission special fund to be administered by the commission.

7 The proceeds in the fund shall be used for the necessary  
8 expenses in administering this chapter and chapters 271 and  
9 271G.

10       (b) All moneys appropriated to, or received or collected  
11 by, the public utilities commission that are not pledged,  
12 obligated, or required by law to be placed in any other  
13 special fund shall be deposited by the director of finance  
14 into the public utilities commission special fund; provided  
15 that forty per cent of the moneys received or collected by the  
16 public utilities commission under sections 92-21, 269-28, 269-  
17 30, 271-27, 271-36, 271G-19, and 607-5 to 607-9 shall be  
18 credited to the consumer advocacy special fund established by  
19 section 269- .

1        (c) Any amount in the public utilities commission  
2 special fund in excess of \$5,000,000 shall be credited to the  
3 general fund."

4        SECTION 2. Part II of Chapter 269, Hawaii Revised  
5 Statutes, is amended by adding a new section to be  
6 appropriately designated and to read as follows:

7        "§269-    Consumer advocacy special fund. (a) There is  
8 established in the state treasury a consumer advocacy special  
9 fund to be administered by the consumer advocate. The  
10 proceeds in the fund shall be used for the necessary expenses  
11 in carrying out the consumer advocate's duties under this  
12 chapter and chapters 271 and 271G.

13        (b) All moneys appropriated to, or received or collected  
14 by, the consumer advocate that are not pledged, obligated, or  
15 required by law to be placed in any other special fund shall  
16 be deposited by the director of finance into the consumer  
17 advocacy special fund, including forty per cent of the moneys  
18 received and collected by the public utilities commission  
19 under sections 92-21, 269-28, 269-30, 271-27, 271-36, 271G-19,  
20 and 607-5 to 607-9.

21        (c) Any amount in the consumer advocacy special fund in  
22 excess of \$3,000,000 shall be credited to the general fund."

1 SECTION 3. Section 269-30, Hawaii Revised Statutes, is  
2 amended to read as follows:

3 "~~§269-30~~ **Finances; public utility fee.** [Section] (a)  
4 Sections 607-5 to 607-9 shall apply to the public utilities  
5 commission and each commissioner, as well as to the supreme  
6 and circuit courts, and all costs and fees paid or collected  
7 hereunder shall be deposited [with] by the director of finance  
8 [of the State to the credit of the general fund.] into the  
9 public utilities commission special fund established under  
10 section 269- and the consumer advocacy special fund  
11 established under section 269- , as provided by law.

12 (b) There shall also be paid to the commission in [each  
13 of] the months of July and December [in] of each year, by each  
14 public utility which is subject to investigation by the  
15 commission, a fee which shall be equal to [one-eighth] one-  
16 fourth of one per cent of the gross income from the public  
17 [utility] utility's business [carried on by the public  
18 utility] during the preceding year, or the sum of \$15,  
19 whichever is greater. This fee shall likewise be deposited  
20 [with] by the director of finance [of the State to the credit  
21 of the general fund.] into the public utilities commission  
22 special fund and the consumer advocacy special fund, as  
23 provided by law.

1       (c) Each public utility paying a fee under subsection  
2 (b) may impose a surcharge to recover the amount paid above  
3 one-eighth of one per cent of gross income. The surcharge may  
4 be imposed by the utility upon thirty days notice to the  
5 public utilities commission. The surcharge imposed shall not  
6 be subject to the notice, hearing, and approval requirements  
7 of this chapter. Unless ordered by the public utilities  
8 commission, the surcharge shall be imposed only until the  
9 public utility's next rate case; provided that the surcharge  
10 shall be subject to refund with interest at the public  
11 utility's authorized rate of return on rate base if the  
12 utility collects more money from the surcharge than it  
13 actually pays due to the increase in the fee to one-fourth of  
14 one per cent."

15       SECTION 4. There is appropriated out of the general  
16 revenues of the State of Hawaii the sum of \$500,000, or so  
17 much thereof as may be necessary for fiscal year 1993-1994, to  
18 be deposited into the public utilities commission special fund  
19 for the purpose of providing continuing services and programs  
20 administered by the commission. The general funds  
21 appropriated in this section shall be expended by the public  
22 utilities commission until sufficient amounts of special  
23 revenues are available in the public utilities commission  
24 special fund to cover the operating costs of the commission.

1 SECTION 5. There is appropriated out of the general  
2 revenues of the State of Hawaii the sum of \$500,000, or so  
3 much thereof as may be necessary for fiscal year 1993-1994, to  
4 be deposited into the consumer advocacy special fund for the  
5 purpose of providing continuing services and programs  
6 administered by the consumer advocate. The general funds  
7 appropriated in this section shall be expended by the consumer  
8 advocate until sufficient amounts of special revenues are  
9 available in the consumer advocacy special fund to cover the  
10 operating costs of the consumer advocate.

11 SECTION 6. Statutory material to be repealed is  
12 bracketed. New statutory material is underscored.

13 SECTION 7. This Act shall take effect upon its approval,  
14 except that sections 4 and 5 shall take effect on July 1,  
15 1993.

Appendix D

Calendar No. 282

103D CONGRESS }  
*1st Session*

SENATE

{ REPORT  
103-181

FEDERAL AVIATION ADMINISTRATION  
AUTHORIZATION ACT OF 1993

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Mr. HOLLINGS, from the Committee on Commerce, Science,  
and Transportation, submitted the following

**R E P O R T**

OF THE

**SENATE COMMITTEE ON COMMERCE,  
SCIENCE, AND TRANSPORTATION**

ON

**S. 1491**



NOVEMBER 12, 1993, -Ordered to be printed  
Filed under authority of the order of the Senate of November 11  
(legislative day, November 2), 1993

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WASHINGTON: 1993

70-010

## **S. 1491 as Amended**

of Representatives a report on the results of the study required in subsection (a). The report shall be submitted within 6 months after the date of enactment of this Act.

### **SEC. 23. EXCEPTIONS APPLICABLE TO STATE OF HAWAII.**

(a) DEFINITIONS. -- (1) Section 101(24) of the Federal Aviation Act of 1958 (49 App. U.S.C. 1301(24)) is amended by adding at the end the following new sentence: "For purposes of title IV, the term 'interstate air transportation' does not include air transportation of passengers commencing and terminating in the State of Hawaii."

(2) Section 101(26) of the Federal Aviation Act of 1958 (49 App. U.S.C. 1301 (26)) is amended by adding at the end the following: "With respect to transportation of passengers by air within the State of Hawaii, the term 'intrastate air transportation' means the carriage of persons by a common carrier for compensation or hire, by such aircraft, commencing and terminating in the State of Hawaii; except that the carriage of passengers moving as a part of a single itinerary on a single ticket for transportation on an air carrier or air carriers, beginning and/or ending outside the State of Hawaii, is deemed to be in interstate transportation."

(b) FEDERAL PREEMPTION. -- (1) Section 105(a) of the Federal Aviation Act of 1958 (49 App. U.S.C. 1305(a)) is amended by adding at the end the following new paragraph:

"(3) The provisions of paragraph (1) shall not apply to any transportation by air of persons commencing and terminating within the State of Hawaii."

(2) Section 105(b)(2) of the Federal Aviation Act of 1958 (49 App. U.S.C. 1305(b)(2)) is amended by striking "(other than the State of Hawaii)".

### **SEC. 24. TECHNICAL AMENDMENTS.**

(a) DEFINITIONS. -- Section 503(a)(2)(B) of the Airport and Airway Improvement Act of 1982 (49 App. U.S.C. 2202(a)(2)(B)) is amended by moving clauses (vii) and (viii) 2 ems to the right.

(b) AIRPORT PLANS. -- Section 504(a)(1) of the Airport and Airway Improvement Act of 1982 (49 App. U.S.C. 2203(a)(1)) is amended by redesignating clauses (1), (2), and (3) as clauses (A), (B), and (C), respectively.

(c) CERTAIN PROJECT COSTS. -- Section 513(b)(4) of the Airport and Airway Improvement Act of 1982 (49 App. U.S.C. 2212(b)(4)) is amended--

(1) by inserting "or (in the case of a commercial service airport which annually has less than 0.05 percent of the total enplanements in the United States) between January 1, 1992, and October 31, 1992," immediately after "July 12, 1976,"; and

(2) by adding at the end the following new subparagraph:

"(D) That, with respect to a project at a commercial service airport which annually has less than 0.05 percent of the total enplanements in the United States, the Secretary may

